



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

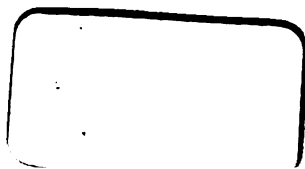
About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

LIBRARY OF THE

LESLIE T. WOOD MEMORIAL LIBRARY

1



丁
丁
川



J. H. Walpole

REPORTS

OF

CASES

DECIDED IN THE

Oct. But,
HIGH COURT OF CHANCERY,

IN 1850 AND 1851,

BY

THE RIGHT HON. LORD CRANWORTH,

VICE-CHANCELLOR.

By NICHOLAS SIMONS, M.A.,

and Barrister-at-Law.

BEING

VOL. I. OF THE NEW SERIES OF HIS REPORTS.

LONDON:

V. & R. STEVENS AND G. S. NORTON,

Law Booksellers and Publishers,

(Successors to the late J. & W. F. CHAPMAN, of Portugal Street,)

26, BELL YARD, LINCOLN'S INN;

AND HODGES & SMITH, GRAFTON STREET,

DUBLIN.

MDCCCLI.

*LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.*

a-56336

JUL 15 1901

**LONDON:
STEVENS AND CO., PRINTERS, BELL YARD,
TEMPLE BAR.**

Lord TRURO	Lord Chancellor
Lord LANGDALE	} Masters of the Rolls.
Sir JOHN ROMILLY	
Sir JAMES LEWIS KNIGHT BRUCE	} Vice-Chancellors.
Lord CRANWORTH	
Sir GEORGE JAMES TURNER	
Sir JOHN ROMILLY	} Attorneys-General.
Sir A. E. COCKBURN	
Sir A. E. COCKBURN	} Solicitors-General.
Sir W. PAGE WOOD	

* * * There are now three Acts of Parliament, each of which authorizes the appointment of a Vice-Chancellor, namely, 53 Geo. III. c. 24, (the Vice-Chancellor of England's Act,) under which Lord Cranworth was appointed ; 5 Vict. c. 5, under which Sir J. L. Knight Bruce was appointed ; and 14 & 15 Vict. c. 4, under which Sir George James Turner was appointed. This last Act does not authorize the appointment of a successor to Sir George Turner.



A

TABLE

OF THE

CASES REPORTED

IN THIS VOLUME.

A.	Page	C.	Page
ATTORNEY-GENERAL		Capper's case	178
<i>v. Hardy</i>	338	Carrick's case	505
		Connell, Macintyre <i>v.</i> , 225, 252,	257
B.		Cope's case	54
Balguy <i>v. Broadhurst</i>	111	Corles, Smith <i>v.</i>	259
Bell <i>v. Jackson</i>	547		
Beman <i>v. Rufford</i>	550	D.	
Best's case	193	Deeks <i>v. Stanhope</i>	439
Bird's case	47	Dickson's Trust, <i>In re</i>	37
Bowker <i>v. Bull</i>	29		
Bright's case	602	E.	
Brittain's case	281	Egerton <i>v. Lord Brownlow</i>	464
Broadhurst, Balguy <i>v.</i>	111		
Browne <i>v. Paull</i>	92	F.	
Brownlow (Lord), Egerton <i>v.</i>	464	Field <i>v. Titmuss</i>	218
Brownrigg, Navulshaw <i>v.</i>	573	Flamank, <i>Ex parte</i>	260
Buck, Vaughan <i>v.</i>	284	Follett <i>v. Jefferyes</i>	3
Bull, Bowker <i>v.</i>	29		

	Page		Page
Foster v. Handley . . .	200	L.	
G.		Little, Goodall v. . . .	155
Gathercole, Hawkins v. 63, 150		Liverpool Dock Acts, <i>In re</i>	202
Gilbert, Richardson v. . . 336		Liverpool, Manchester and	
Goodall v. Little . . . 155		Newcastle-upon-Tyne Junc-	
Gould, Homer v. . . . 541		tion Railway Company,	
H.		Preston v.	586
Hall, South Staffordshire		Lloyd, Stuart v. . . .	56
Railway Company v. . . 373		——, <i>Ex parte</i> . . .	248
Handley, Foster v. . . . 200		Lyne v. Pennell . . .	113
Hardy, Attorney-General v. 338		M.	
Hawkins v. Gathercole 63, 150		Macintyre v. Connell, 225, 252,	
Holdsworth, Johnson v. . . 106			257
Holt's case 389		Mackinnon v. Stewart . .	76
Homer v. Gould 541		Manning v. Thornhill . . .	451
Humphrey v. Humphrey . . 536		Myers v. Watson	523
Hunter's case 435		N.	
J.		Navulshaw v. Brownrigg .	573
Jackson, Bell v. 547		Newman v. Warner . . .	457
James, <i>Ex parte</i> 140		O.	
Jefferyes, Follett v. . . . 3		Onions's case	394
Johnson v. Holdsworth . . 106		P.	
Jones, West v. 205		Parkinson's Trust, <i>In re</i> .	242
K.		Paull, Browne v.	92
Kemp v. Sober 517		Pennell, Lyne v.	113
King of the Two Sicilies v.		Phillipps, <i>Ex parte</i> . . .	605
Willcox 301, 332, 334		Preston v. Liverpool, Man-	

A TABLE OF THE CASES REPORTED.

vii

	Page		Page
chester and Newcastle-upon-Tyne Junction Railway Company . . .	586	Stanhope, Deeks v. . .	439
		Stevens v. Williams . .	545
		Stewart, Mackinnon v. .	76
		Stuart v. Lloyd . . .	56
R.			
Richardson v. Gilbert . .	336	T.	
Riddell's case . . .	402	Thornhill v. Manning . .	451
Ross's trust, <i>In re</i> . . .	196	Titmuss, Field v. . .	218
Rudall, Simmons v. . .	115		
Rufford, Beman v. . .	550	U.	
Russell's trust, <i>In re</i> . .	404	Upfill's case . . .	395
S.		V.	
Sherwood Loan Company, <i>In re</i> . . .	165	Vaughan v. Buck . . .	284
Shrewsbury and Birmingham Railway Company, Shrewsbury and Chester Railway Company v. . .	410	W.	
Shrewsbury and Chester v. Shrewsbury and Birmingham Railway Company . .	410	Warde v. Warde . . .	18
Sichell's case . . .	187	Warner, Newman v. . .	457
Simmons v. Rudall . . .	115	Watson v. Young . . .	114
Smith v. Corles . . .	259	——, Myers v. . . .	523
——, <i>Ex parte</i> . . .	165	Webster v. South Eastern Railway Company . .	272
Sober, Kemp v. . . .	517	West v. Jones . . .	205
South Eastern Railway Company, Webster v. . .	272	Willcox, King of the Two Sicilies v. . .	301, 332, 334
South Staffordshire Railway Company v. Hall . . .	373	Williams, <i>Ex parte</i> . .	57
		Williams, Stevens v. . .	545
		Williams v. Williams . .	358
		Wilson v. Wilson . . .	288
		Y.	
		Young, Watson v. . . .	114



MEMORANDUM.

SIR LANCELOT SHADWELL, Vice-Chancellor of *England*, died in August 1850.

He was succeeded by Sir **ROBERT MONSEY ROLFE**, one of the Barons of the Exchequer ; who, in Michaelmas Term following, was sworn in a member of the Privy Council, and, during the sittings after that Term, was created a Peer of the United Kingdom, by the title of **BARON CRANWORTH** of *Cranworth* in the county of *Norfolk*.

MEMORANDUM.

✓ *Warde v. Warde, ante*, p. 18, has been reversed. See
3 Macn. & Gord. 361.



CASES IN CHANCERY,

BEFORE

VICE-CHANCELLOR LORD CRANWORTH.

Shallton v. Bowles 11 W R 504
FOLLETT v. JEFFERYES.

THOMAS CAPE, by the second codicil to his will, dated the 16th of June 1847, directed his executors and trustees to appropriate and set apart a sufficient fund to pay an annuity of 200*l.* to the Defendant *John Taylor*; and, until he should assign, charge or otherwise dispose of the annuity, or any part of it, by way of anticipation, or attempt or agree so to do, or do some act whereby the annuity, if payable to himself, would become vested in some other person or persons, to pay it to him for his own proper use and benefit: and, if he should assign, charge or otherwise dispose of it or any part of it, by way of anticipation, or attempt or

1850 :
6th November
and
2nd December.

Answer.
Insufficiency.
Privileged communications.
Fraud.

which had passed between her and her solicitor, and which, it stated, showed that the deed was prepared and executed for the alleged fraudulent purpose. The Defendant, in her answer, declined to set forth the contents of the letters, as being privileged communications. The Court held that the transaction, according to the account of it given in the bill and answer, was not a fraud; and, therefore, that the Defendant was not bound to set forth the contents of the letters.

Communications between a solicitor and his client relative to a fraud contrived between them, are not *exceptions* to the general rule; they do not fall within the rule itself: for the rule applies, not to all that passes between a solicitor and his client, but only to what passes between them in professional confidence; and no Court can permit it to be said that the contriving of a fraud forms part of the professional occupation of an attorney or solicitor.

1850.

FOLLETT

v.

JEFFERYES.

solicitors of *Taylor* and his wife, and was signed, sealed and delivered by *Taylor* and also by the Defendant *Thomas Bristowe Young* (who was a partner in the firm of *Holme and Co.*): that the pretended indenture, being the instrument so signed, sealed and delivered as aforesaid, purported to be an indenture dated the 24th of May 1848, and made between *Taylor* of the one part, and *Young* of the other part; and thereby, after reciting the will and second codicil, and death of the testator, and that *Taylor*, in consideration of the natural love and affection which he had for his wife, and of the benefits he had received from her, and in order to make a better provision for her, had determined and agreed to assign the annuity to *Young* in trust for the separate use of his wife: *Taylor* assigned the annuity to *Young*, in trust for the separate use of his wife, without power of anticipation. The bill further charged that no consideration whatever was given for the said pretended assignment, and that the same was prepared, signed, sealed and delivered for the mere purpose of defrauding the Plaintiffs as such sequestrators as aforesaid, by making it appear that the annuity had become forfeited in pursuance of the proviso contained in the second codicil: that the said instrument was not prepared, signed or sealed with a view of really vesting the annuity in *Young*; and that *Young*, at the time of executing the same, had been advised and well knew that the annuity would not actually pass to him as such trustee as aforesaid: that, under the circumstances aforesaid, the preparation, signing, sealing and delivery of the pretended indenture, were a mere fraud, and the same was wholly void as against the Plaintiffs. And the bill prayed for a declaration to that effect, and for relief consequential thereon.

Mrs. *Taylor*, in her answer, said that her husband,

upon his becoming aware of the bequest of the annuity to him, was desirous that it should be secured for her benefit; and, accordingly, she and her husband consulted together and with *Young* as to the mode in which such desire could be carried into effect: that she believed that it was the desire and intention of the testator that no portion of the annuity should become payable to any person other than her husband or the other persons mentioned or referred to in the testator's second codicil, and, particularly, that the annuity should not be liable to be taken in execution or otherwise appropriated by her husband's creditors: that she and her husband were advised that, under the provisions of the second codicil, no assignment of the annuity in her favour would be effectual against the claims of the parties for whose benefit the same was, in that codicil, directed to be applied in the event of her husband attempting to alienate the same, in case such other parties should insist upon the forfeiture of his interest therein; but, nevertheless, he resolved, to execute an assignment of the annuity to a trustee for her, in the hope that, if the forfeiture was insisted upon, the testator's trustees and executors might, in the exercise of the discretion given to them by the second codicil, apply the annuity, or some part thereof, for her benefit: that, with a view of effecting, if possible, her husband's desire and intention, and also the desire and intention of the testator, her husband, with her privity, determined, upon the suggestion and advice of counsel, to assign the annuity to a trustee for her, so as effectually to divest his interest therein, and either to secure the annuity for her benefit, or to effect a forfeiture of it, and thereby to prevent it from being taken by the Plaintiffs under the sequestration, and to enable the trustees and executors to exercise the discretion given to them, by the second codicil, in the event of any attempt, by her husband, to

1850.
FOLLETT
v.
JEFFERIES.

1850.

FOLLETT

v.

JEFFERYES.

alienate the annuity : that she and her husband did, at the time in the bill mentioned, and under such circumstances and with such view and intention as before mentioned, but not further or otherwise, consult with *Young*, as their solicitor, in order to devise some means of defeating the claims of the Plaintiffs to the annuity, and of securing it for her benefit. Mrs. *Taylor* then admitted the execution of the indenture of the 24th of May 1848, and said that it was executed for the purpose of vesting the annuity in *Young*, as a trustee for her, if the same could be effectually done under the provisions of the second codicil, and, if it could not be effectually done, then for the purpose of effecting a forfeiture of the annuity, and of enabling the executors and trustees to exercise such discretion as aforesaid. She added that *Young*, as her trustee and solicitor, had, in his possession, the indenture of the 24th of May 1848, and also the several other documents relating to the matters in the bill mentioned, which were set forth in the schedule to her answer ; but that the documents mentioned in the second part of the schedule, *consisted of a case for the opinion of Counsel, opinions of Counsel, and confidential communications between her and her husband, and Young as her solicitor, with reference to the matters in question in this suit, and to her defence against the claims made by the Plaintiffs in this suit ; and she submitted that she was not bound and ought not to be compelled to produce the same.*

Upon the coming in of that answer, the Plaintiffs obtained an order from the late *Vice-Chancellor of England*, for the production of the documents mentioned in the second part of the schedule ; but that order was discharged by Lord *Cottenham*, C. (a).

The Plaintiffs then amended their bill, by introducing the following charges: That, after Mr. and Mrs. *Taylor* and their solicitors, had become acquainted with the contents or purport of *Cape's* will and codicils, but before the 24th of May 1848, *Holme and Co.*, as their solicitors, stated, a case for the opinion of Counsel, and, in such case, the fact of the writ of sequestration having issued, was stated, and a copy or statement of the codicil bequeathing the annuity, was contained in or accompanied the case: that, before the signing of the alleged indenture of the 24th of May 1848, *Taylor* and his wife, respectively, wrote letters to and received letters from *Young*, the trustee named in the indenture: that the letters so written and received, related to the subject of the annuity and to the preparing of the indenture, and to the real purpose for which it was proposed to execute the same, and to the expediency of *Taylor's* voluntarily doing some act to forfeit or determine his right to the annuity, and to the means of defeating the title of the Plaintiffs to it and retaining the benefit of it for Mrs. *Taylor* and the testator's residuary legatees, or some of them: that the case, opinion and letters showed what was the real intention of Mr. and Mrs. *Taylor* and *Young*, in becoming parties to the indenture of the 24th of May 1848; and that they showed, as the fact was, that the plan of preparing and executing such indenture, was resorted to for the purpose of effecting a forfeiture of the annuity, or a determination of the title of the Plaintiffs and *Taylor* thereto, and in order to defeat the title of the Plaintiffs as such sequestrators as aforesaid, and was not resorted to for the purpose of really and effectually vesting the annuity in *Young*, upon the trusts in the same indenture declared: that, by the case, Counsel were requested to advise whether a forfeiture or deter-

1850.

FOLLETT

v.

JEFFERIES.

1850.

FOLLETT

v.

JEFFERYES.

mination of *Taylor's* interest in the annuity, might not be effected by his executing an assignment thereof, or by some other and what means; and to advise, generally, as to the best means of withdrawing the annuity from the power of the Plaintiffs as such sequestrators as aforesaid: that Counsel wrote an opinion upon the case, and advised that a *bonâ fide* assignment of the annuity by *Taylor*, if such assignment were possible, would determine his right thereto and the right of the Plaintiffs as claiming under him; but he also advised that no estate or interest in the annuity would or could, under any assignment, become vested in the person or persons to whom the same might purport to be assigned; and that a deed purporting to be an assignment of it, but not really passing and not intending to pass or assure it, would be merely colourable, and would not affect the title of the Plaintiffs as such sequestrators.

Mrs. *Taylor*, by her answer to the amended bill, denied that, before the signing of the indenture of the 24th of May 1848, she and Mr. *Taylor*, or she alone, wrote any letter to or received any letter from *Young* as the trustee named in that indenture, or, save as appeared by her former answer and the schedule thereto, in any other character; and she, in substance, submitted and insisted that, under the circumstances in her present answer and in her former answer appearing, she was not bound and ought not to be compelled to answer any of the interrogatories, in the amended bill, relating to the contents, purport, or effect of the letters or of the case and opinion; and she claimed the like benefit of objection to such parts of the bill as sought such discovery, as if she had demurred thereto.

The Plaintiffs excepted to her answer, for insufficiency, on the ground that she ought to have answered those interrogatories. The *Master* overruled the exceptions : upon which the Plaintiffs excepted to his report.

1850.
FOLLETT
v.
JEFFERIES.

Mr. *Bethell* and Mr. *Kinglake*, in support of the exceptions to the report, said that this case did not come within either *Holmes v. Baddeley* (b), *Herring v. Cloberry* (c), or *Combe v. The Corporation of London* (d) : that the Plaintiffs were entitled to a production of the deed of the 24th of May 1848, which their bill impeached for fraud : that all the communications which took place, between Mrs. *Taylor* and her solicitor, with a view to that deed, were part of the *res gestæ* of the fraudulent transaction : that the charges in the amended bill, connected the discovery sought with the fraudulent act complained of, and, therefore, according to Lord *Cottenham's* judgment in 13th Jurist, 973, the case was taken out of the ordinary rule : that *Young*, Mrs. *Taylor's* solicitor, was made a co-Defendant to the suit, as being a party to the fraud : that there could be no doubt that he was compellable to give the discovery which she had declined to give ; and it would be absurd to hold that a client could withhold the discovery, which his solicitor was bound to give : *Reynell v. Sprye* (e).

Mr. *James Parker* and Mr. *Freeling*, for Mrs. *Taylor*, said that there was no fraud whatever in the transaction to which the bill related : that it was not *aliud simulatum*, *aliud actum*, but *idem simulatum*, *idem actum* : that, notwithstanding the amendments, the case was

(b) 1 Phill. 476.

(e) 10 Beav. 51, and 11

(c) *Ibid.* 91.

Beav. 618.

(d) 1 Youn. & Coll. 631.

1850.
 FOLLETT
 v.
 JEFFERYES.

substantially the same as it was when it came before Lord *Cottenham*; and therefore his decision was, in effect, a decision on the question raised by the present exceptions: that *Reynell v. Sprye* illustrated the kind of case which Lord *Cottenham* had in view when he said that, no doubt, pleadings might be so framed as to make a special case connecting the discovery sought with the fraudulent act complained of, so as to take the case out of the ordinary rule: that the circumstance of *Young* being a party to the suit, made no difference as to the sufficiency of Mrs. *Taylor's* answer: that the privilege insisted on, was the privilege of the client and not of the solicitor, and that it was not alleged that *Young* had acted otherwise than in his professional character: *Pearse v. Pearse (f)*, *Reece v. Trye (g)*, *Greenough v. Gaskell (h)*, *Herring v. Clobery, Jones v. Pugh (i)*, *Carpmael v. Powis (j)*, *Dendy v. Cross (k)*.

Mr. *Bethell*, in his reply, referred to Lord *Walsingham v. Goodricke (l)*.

THE VICE-CHANCELLOR :

This was a case of exceptions to the *Master's* report as to the sufficiency of the answer of the Defendant, *Henrietta Savill Taylor*, the wife of the Defendant *John Taylor*. The Plaintiffs are commissioners of sequestration appointed in a Cause of *Cowper v. John Taylor and others*, in which the Defendant, *Taylor*, had been ordered to pay a large sum of money into Court. He made default in doing so; and a writ of sequestra-

- | | |
|---------------------------|-------------------|
| (f) 1 De Gex & Smale, 12. | (j) 1 Phill. 687. |
| (g) 9 Beav. 316. | (k) 11 Beav. 91. |
| (h) 1 Myl. & Keen, 98. | (l) 3 Hare, 122. |
| (i) 1 Phill. 96. | |

tion issued against him. The object of the present suit, instituted by the sequestrators, is to set aside a deed executed by *Taylor*, purporting to assign away an annuity of 200*l.*, to which he was entitled under the will and codicils of *Thomas Cape*; and, by reason of which assignment, the Plaintiffs allege that they have been improperly prevented from possessing themselves of the annuity.

1850.
FOLLETT
v.
JEFFERYES.

Taylor's title to the annuity, arose under the second codicil to *Cape's* will; which is as follows: "I direct," &c.

Cape, the testator, died in January 1848; and his will and codicils were, soon afterwards, proved by his executor, the Defendant *Jefferyes*; who possessed assets more than sufficient to pay his debts and legacies. The original bill, after stating these facts, and that the Plaintiffs had made, during the spring of the year 1848, many ineffectual attempts to get possession of the annuity, contains the following charges (*m*); and it prays that the assignment may be declared to be fraudulent, and that the annuity may be secured for the benefit of the Plaintiffs.

Mrs. *Taylor*, by her answer to the original bill, states as follows (*n*):

Upon the coming in of this answer, a motion was made, before the late *Vice-Chancellor of England*, for the production of the documents mentioned in the second part of the schedule. The motion was resisted by the Defendants, Mrs. *Taylor* and Mr. *Young*, who

(*m*) See *ante*, pages 5 and 6. (*n*) See *ante*, pages 6, 7 and 8.

1850.

FOLLETT

v.

JEFFERYES.

contended that the documents came all within the class of privileged communications. His Honour, however, thought differently, and ordered their production, on the ground that they all related to the very deed impeached by the bill.

There was then a motion, by way of appeal, to Lord *Cottenham*, who discharged the order of the *Vice-Chancellor*, being of opinion that none of the authorities warranted the distinction on which the *Vice-Chancellor* had proceeded. His Lordship, according to the report in the *Jurist*, Vol. XIII. p. 973, added that, no doubt, pleadings might be so framed as to make a special case connecting the discovery sought with the fraudulent act complained of, so as to take the case out of the ordinary rule; but that, here, no special case was made, and the allegations in the answer, brought the case within the ordinary rule.

After this order of Lord *Cottenham's*, the Plaintiffs amended their bill by introducing the following charges (o) :

The Defendant, Mrs. *Taylor*, having been called upon to answer these amendments, put in an answer by which, in substance, she declined to disclose anything as to the contents of the case or the letters. Her answer was excepted to on that account; but the *Master* disallowed the exceptions. The Plaintiffs then excepted to the *Master's* report; and so the matter comes before me.

I have been thus particular in stating the pleadings and referring to what has already been done; because

(o) See *ante*, pages 9 and 10.

it will, I think, be manifest, on considering the proceedings up to the present time, that the question for my decision is brought within very narrow limits. The question before Lord *Cottenham* did not, it is true, arise on exceptions to the answer; but his Lordship's decision proceeded on principles which would, certainly, have been applicable to such a case. On the same grounds on which he decided that the Defendant was not bound to produce the case and letters, he would, on the record as it was framed when the matter was before him, have decided that she was not bound to answer interrogatories calling on her to set forth the contents or the purport and effect of them. The single question, therefore, on which I have to decide, is whether the amendments which have been made in the charges of the bill, are such as to vary the rights of the Plaintiffs with respect to the discovery to which they are entitled; in other words, whether, adopting the language of Lord *Cottenham*, the Plaintiffs have now, on the amended bill, made a special case connecting the discovery sought with the fraudulent act complained of, so as to take the case out of the ordinary rule. I think they have not. For such a purpose, it is essential that the act complained of, should, on the face of the bill, appear to be a fraud. Such was the case of *Reynell v. Sprye*. There, the client penned a letter to be copied and sent to him by the attorney, as if emanating from the attorney himself, with a view to its being shown to the Plaintiff, so as to lead him to sell his estate at an undervalue. Lord *Langdale* held that there was no privilege protecting the client or the attorney from producing this letter. So, in the present case, if the annuity had been forfeitable, not on any assignment or attempt to assign, but only on an assignment by way of

1850.
FOLLETT
v.
JEFFERYES.

1850.

FOLLETT

v.

JEFFERYES.

sale, and the solicitor had been party, with *Taylor*, to a scheme for framing a deed which should purport to be, but should not, in truth, be, a sale; *that* would be a fraud, and both client and solicitor would be bound to discover all which had passed, between them, in reference to the preparation of such a deed. So, again, if the forfeiture had been made to depend on the assignment having been made before a particular date, and the solicitor had been party to a plan for getting the deed ante-dated: and many similar cases may be suggested. But, here, I can discover no fraud whatever in the transaction, whether as stated by the Plaintiffs or the Defendant. It may not, indeed, be a very moral act in a debtor, so to dispose of his property as that his creditors may be effectually prevented from getting execution; but such an act, *per se*, is no fraud, if the disposition is one which the law allows. And the amended charges in this bill, amount to no more than this: that the object of *Taylor* was not, really, to vest the property in *Young* for the benefit of his wife; for *that*, by the express provision of the codicil, he could not do; but to make an assignment which should cause a forfeiture, and so give the property to the parties entitled on the happening of the forfeiture. This is the account of the transaction, as stated both in the bill and the answer; and, in my opinion, this was not a fraud according to any definition of fraud which can be recognised in this Court. The transaction, as stated on this bill, is one as to which it was perfectly lawful for the client to ask, and for the solicitor to give professional advice. And this seems to me to be the true test, in a case like the present, as to whether what has passed is or is not privileged. It is distinctly sworn that the documents in question, contain or relate to advice so asked for and

given, with reference to the very question now in dispute; and the case, therefore, is one which I consider as coming within the admitted rule of privilege. I am, therefore, of opinion that the *Master* is right, and the exceptions to his report, must be overruled.

1850.
 FOLLETT
 v.
 JEFFERYES.

It may not be unfit that I should repeat an observation I made in the course of the argument, namely, that it is not accurate to speak of cases of fraud contrived by the client and solicitor in concert together, as cases *of exception* to the general rule. They are cases not coming within the rule itself: for the rule does not apply to all which passes between a client and his solicitor, but only to what passes between them in professional confidence: and no Court can permit it to be said that the contriving of a fraud, can form part of the professional occupation of an attorney or solicitor.

Warde v. Warde

1850:
7th Nov.

WARDE v. WARDE.

*Husband and
wife.
Privileged
communications.
Production of
documents.*

A. being desirous to sell an estate on which his wife's jointure was secured, she and her trustees, released the estate from her jointure, and he covenanted to secure it on such estates as he might thereafter acquire. He, afterwards, purchased an-

THE bill was filed, in August 1849, by *Marianne*, the wife of the Defendant, *Charles Thomas Warde*, who were then living separate from each other. It stated that, by the settlement on their marriage, dated in 1834, Mr. *Warde* conveyed estates in *Warwickshire*, to trustees, in trust to secure a jointure of 1000*l.* a year to Mrs. *Warde*; that, in 1844, Mr. *Warde* agreed to sell those estates; and that Mrs. *Warde* and her trustees, at his request, consented to release them from the jointure, on his undertaking to secure it on an estate, at *Luton* in *Bedfordshire*, which he had agreed to purchase; that, in pursuance of that arrangement, Mrs. *Warde* and her trustees joined in executing a deed dated the 20th of September 1845, by which the *Warwickshire* estates were conveyed to Mr. *Warde* in fee, freed from the jointure, and he covenanted, with his wife's trustees, to secure a jointure of 1000*l.* a year for her, upon such real

other estate, but declined to perform his covenant. Whereupon she filed a bill to compel him to perform it, charging that she entered into the aforesaid arrangement, *under the advice of her husband's solicitor and Counsel and without having any other legal advice*, and charging also that the solicitor, who was made a co-defendant, had, in his possession, cases for the opinion of Counsel and the opinions thereon and other documents relating to the matters mentioned in the bill. The husband and his solicitor admitted these charges, but added that the cases and opinions came into and were in the solicitor's possession, *as the husband's solicitor*; and the husband said that the cases were laid before Counsel, *on his behalf and by his direction and not on behalf or by the direction of any other person*. A motion, on the wife's behalf, for the production of the cases and opinions and of certain letters which had passed between the husband and his solicitor, and which he alleged to be confidential communications, was refused.

estates *as he should thereafter acquire*: that the *Warwickshire* estates were afterwards sold, and the proceeds paid to Mr. *Warde*; and he was, thereby, enabled to pay for the *Luton* estate; and that he had paid for it, and thereby, entitled himself to have it conveyed to him; but that he had not secured the jointure upon it, or upon any other estate. The bill charged that, in 1845, Mr. *Warde* laid, before Counsel, divers cases for their opinion, and gave, to Counsel, instructions for the preparation of deeds for the purpose of releasing the *Warwickshire* estates from the jointure, and that a considerable correspondence passed between him or his legal advisers, and the Defendant *J. B. Lawes* (one of his wife's trustees) and his legal advisers; and that, by such cases and instructions and correspondence, if produced, the fact that Mr. *Warde* intended and agreed to charge the *Luton* estate with the jointure, would appear: that Mrs. *Warde* had no separate solicitor or Counsel, and that she entered into the aforesaid arrangement for the release of the *Warwickshire* estates from her jointure, and executed the indenture of September 1845, *under the advice of Mr. Warde's solicitor and Counsel, and without having any other legal advice*: and that the Defendants, or some one of them, had, in their possession or power, or in the possession or power of their solicitors or agents, divers deeds, cases for the opinion of Counsel, and instructions to Counsel for the preparation and settlement of deeds, and other writings, relating to the matters aforesaid, or by which the truth thereof would appear, and that they ought to produce the same. The bill prayed that Mr. *Warde* might be decreed to secure a jointure of 1000*l.* a year to the Plaintiff, upon the *Luton* estate.

1850.
 WARDE
 v.
 WARDE.

Mr. *Warde*, in his answer, denied that he undertook

1850.

WARDE

v.

WARDE.

to secure the jointure on the *Luton* estate, and said that, in August 1847, finding himself unable to complete the purchase of that estate, he agreed to sell it to Mr. *John Shaw Leigh*, and that that gentleman had instituted a suit against him to enforce the performance of the agreement; and that he was unable to charge the jointure on that estate, and, therefore, had refused so to do. He admitted that, in 1845, he did lay or cause to be laid, before Counsel, divers cases for their opinion, and give or cause to be given, to Counsel, some general instructions for the preparation of all necessary deeds for the purpose of releasing the *Warwickshire* estates from the jointure; and that some considerable correspondence respecting such release, did pass between him and his legal advisers, and the Defendant *Laves* and his legal advisers; and he submitted that he was not bound to produce or answer as to the purport or nature of the instructions given by him to his solicitors or legal advisers, or of cases laid before Counsel or of the correspondence that passed between him and his solicitors, having reference to the matters at issue in the Cause: but he admitted that, by such cases, instructions and correspondence, the fact that he did, at one time, intend to charge the *Luton* estate with the jointure, as soon as the purchase of it was completed, would appear, but he denied that it would appear that he *agreed* so to charge that estate. He admitted that his wife *had no separate solicitor or Counsel*, and that she entered into the arrangement for the release of the *Warwickshire* estates from her jointure and executed the indenture of September 1845, *under the advice of his solicitors and Counsel, without having any other legal advice*. He added that he had, in the first and second schedules to his answer, set forth a list of all the particulars inquired after by the bill, which were then in his possession; but

that all the particulars in the second schedule, consisted of cases and the opinions of Counsel thereon, and letters between him and his solicitors relating to matters at issue in the suit; and that the particulars contained in the second part of the second schedule, consisted of cases, opinions and letters stated, given and written after the dispute, between him and his wife, as to the matters at issue in the Cause, had arisen, and with a view to and in expectation of this suit; and, therefore, he submitted that he ought not to be compelled to produce any of the particulars contained in the second schedule; and, save as aforesaid, he denied that he had in his possession or power, or in the possession or power of his solicitors or agents, any writings relating to the matters mentioned in the bill.*

1850.
WARDE
v.
WARDE.

Henry Bury, another Defendant to this suit, said, in his answer, that, in 1844, Mr. *Warde* contracted for the purchase of the *Luton* estate, and that before, at and subsequently to the date of that contract, he was the solicitor and professional adviser of Mr. *Warde*, and that he was and acted as such in the purchase of the *Luton* estate, and also in the sale of the *Warwickshire* estates, and in all matters relating thereto respectively, except as to the contract for the purchase of the *Luton* estate.

* According to the brief with which the reporter was furnished, the second schedule to Mr. *Warde's* answer consisted of one part only. The following were its contents: 13th Nov. 1847—draft case and copy thereof with the opinion of Mr. *Giffard* thereon: two bundles of letters addressed by Mr. *Bury* (who had been Mr. *Warde's* solicitor) to Mr. *Warde*, from 1845 to 1847: twenty-three letters from Messrs. *Clarke and Co.* to Mr. *Warde*; and one letter from Mr. *Lowe* to Messrs. *Clarke*; but who Messrs. *Clarke* and Mr. *Lowe* were, did not appear.

1850.

WARDE

v.

WARDE.

and several contracts for the sale of parts of the *Warwickshire* estates, which Mr. *Warde* signed without professional advice: that he had not any knowledge or information concerning the said contract or concerning the sale of the *Warwickshire* estates or any particulars relating thereto respectively, except what he had acquired in his confidential character as such solicitor; and that his knowledge of and relating to the said contract and the sale of the *Warwickshire* estates, and all particulars and matters relating thereto respectively, was obtained by and confided to him, merely, in his character of such solicitor: that he had not any authority or permission, from Mr. *Warde*, to make any disclosure, to Mrs. *Warde*, relating to the said contract, or to the sale of the *Warwickshire* estates, or the matters consequent thereon; and that he was advised that he could not, without a violation of his professional duty as such solicitor as aforesaid, make any further disclosure in relation to the matters aforesaid or any of them. He admitted that Mrs. *Warde* had not any separate solicitor or Counsel; and that she entered into the arrangement for the release of the *Warwickshire* estates from her jointure and executed the indenture of the 20th of September 1845, *under the advice of her husband's solicitor and Counsel, and without having any other legal advice*: that there were in his possession, *as such solicitor as aforesaid*, divers documents, cases and the opinions of Counsel thereon, and other papers and writings relating to the purchase of the *Luton* estate and the sale of the *Warwickshire* estates, all of which belonged to and *came into his possession as the solicitor of Mr. Warde*; and he was advised and submitted that, under the circumstances aforesaid, he could not, without a violation of professional confidence, and, therefore, that he ought not to disclose whether thereby, or by any of them, if pro-

duced, the truth of the matters in the bill mentioned or any of them, would appear; however that he had, in the second schedule to his answer, set forth a list of all such documents, cases and opinions of Counsel, papers and writings as were then in his possession as such solicitor as aforesaid; and he submitted, to the judgment of the Court, whether, under the circumstances aforesaid, he was or was not bound to produce the same. The last-mentioned schedule contained a list of cases and opinions dated in 1844, 1845 and 1846: of instructions for and drafts of conveyances of the *Warwickshire* estates: of drafts, letters and papers relating to the sale of parts of those estates and to the purchase of the *Luton* estate: of letters written, by Mr. *Warde* and Mr. *Lawes*, to Mr. *Bury*, in 1844, 1845, and 1846; of copies of letters from *Bury* to Mr. *Warde* during the same years; and of bills of costs relating to Mr. *Warde's* business.

After notice of a motion for the production of the documents admitted, by Mr. *Warde* and Mr. *Bury*, to be in their possession, and, particularly, of those alleged, by *Bury*, to be privileged, had been served, Mr. *Warde* filed an affidavit stating that *Bury* was his solicitor in and prior to 1844, 1845 and 1846; that, when he put in his answer, he did not recollect that *Bury*, who ceased to be his solicitor in June 1847, had any documents belonging to him; and, therefore, the documents mentioned in the second schedule to *Bury's* answer, were omitted in the schedules to his answer; but that he was now informed and believed that *Bury* had those documents in his possession; and that the same came into, and still were in *Bury's* possession, as his late solicitor and professional adviser: that he believed that the greater part of those documents consisted of instructions to Counsel and cases for the opinion of Counsel and the opinions

1850.

WARDE

v.

WARDE.

1850.

WARDE

v.

WARDE.

thereon and copies thereof, and letters between himself and *Bury* as his solicitor, relating to the matters at issue in the Cause; and, in particular, that certain of those instructions, cases and opinions (which he specified) were given to, laid before and obtained from Counsel, on his behalf and by his direction, *and not on behalf of or by the direction of any other person*, after he had agreed to purchase the *Luton* estate and to sell the estates charged with the jointure, and after some discussion had arisen with reference to the proposed arrangement for releasing those estates from the jointure, which was afterwards carried into effect, and which was in question in this suit: and that certain of the letters and copies of letters, (which also he specified) were confidential letters and copies of confidential letters which passed between him and *Bury* as his solicitor, and that some of them were written after he had agreed to purchase the *Luton* estate and to sell the estates charged with the jointure, and after some discussion had arisen with reference to the before-mentioned arrangement: and, therefore, he submitted that none of the particulars thereinbefore mentioned, ought to be produced: and, as to all the other items contained in the second schedule to *Bury's* answer, he said that he was not able, from the description thereof contained therein, to specify whether any of them were or were not of such a nature, or privileged in such a manner as the particulars thereinbefore mentioned, and which he had, thereby, submitted ought not to be produced; and that he should not be able to satisfy himself on that point, without an opportunity, which he had not yet had, of inspecting the same.

Mr. *Stuart* and Mr. *Dickinson*, in support of the motion, said that, at the time when the transaction took

place, to which the documents in question related, no dispute or controversy existed between Mr. and Mrs. *Wurde*, but there was a community of object and an identity of interest between them: that the cases were stated and the opinions taken, not with a view to defeat Mrs. *Warde's* jointure, but in order to ascertain how it could be effectually secured; and that Mr. *Warde*, in his answer, admitted, in effect, that his solicitor in the transaction was his wife's solicitor also, for he admitted that she had no separate solicitor or Counsel and that she acted under the advice of his legal advisers: that the questions in this suit, arose long after the arrangement spoken of in Mr. *Warde's* affidavit, had been carried into effect; and there was nothing in this case to bring any of the documents sought to be produced, within the exception made in the order in *Hughes v. Biddulph* (a).

1850.

WARDE
v.
WARDE.

Mr. *Messiter* appeared for the Defendant *Bury* but did not address the Court, as Counsel appeared to oppose the motion on behalf of Mr. *Warde*.

Mr. *Bethell* and Mr. *Erskine*, for Mr. *Warde*, said that there was not a single passage in either of the answers, which showed that the documents were prepared on behalf of Mrs. *Warde* as well as her husband; but that it appeared, from the answers, that those documents were prepared on behalf of Mr. *Warde* alone, at a time when he and his wife were dealing at arm's length with each other, and with reference to a matter in controversy between them: that *Bury*, in his answer, stated, distinctly, that he got possession of the documents in the character of Mr. *Wurde's* solicitor; and the Plaintiff

(a) 4 Russ. 190, see 192.

1850.

WARDE

v.

WARDE.

must take that statement as she found it: *Herring v. Clobery (b)*, *Perry v. Smith (c)*.

Mr. *Stuart*, in his reply, relied on the concluding sentence of Mr. Baron *Alderson's* judgment in *Perry v. Smith (d)*.

The VICE-CHANCELLOR :

The conclusion at which I have arrived in this case, is that I cannot order these documents to be produced. I admit, however, that I have come to that conclusion with some reluctance.

I think that this case must be treated in the same way as it would have been, if the Plaintiff, instead of being the wife of Mr. *Warde*, had been a stranger having a charge on his *Warwickshire* estates, and Mr. *Warde*, having entered into a contract for the sale of those estates, and finding himself embarrassed by that charge, had consulted his solicitor and taken the opinions of Counsel as to the mode of getting the estate relieved from the charge; and correspondence had taken place between him and his professional advisers, on the subject. Then there would be no doubt that, if the party entitled to the benefit of the charge, afterwards, adversely, instituted proceedings, she could not compel him to produce that which had passed between him and his solicitor and Counsel; because, whatever might have been the case formerly, it is now clear that anything that passes between a party and his legal adviser, whether in a Cause, or with a view to a Cause, or with reference to a matter that afterwards becomes the subject of litigation, is a privileged matter, and that the client has a right to

(b) 1 Phil. 91; see judgment.

(c) 9 Mees. & Wels. 681.

(d) *Ibid.* 683.

say that the solicitor shall not disclose what passed. There can be no doubt, in that state of things, that the Plaintiff would not have a right to call for the production of the opinions and cases.

1850.
WARDE
v.
WARDE.

Then does it alter the case that the Plaintiff did not choose to employ a solicitor of her own, but chose to act on the advice of the same party who was giving advice to the person who was selling the estate? I think that makes no difference, unless you can bring it to this point, that the party having the charge and the party selling the estate employed the same solicitor in stating the cases and obtaining the opinions. Then the solicitor would be their joint solicitor, and there can be no doubt that either party might call for the production of those documents; for, in such a case as that, there would be exactly the same professional confidence with the one as with the other. But, unless you can bring it to that, the circumstance that the party having the charge chooses to rely on the advice of the same person as the party selling the estate is consulting, does not seem to me to make any difference at all. It may make it rather more probable that he was employed by them jointly; but, unless you can bring it to that, it does not seem to me to vary the case.

Is it then different in the case of a wife? Now I put out of the question the husband and wife being, for many purposes, considered as the same person: a sort of legal fiction meaning that their interests are, in a great measure, identified. But I consider that that makes no difference at all, except so far as it would be a circumstance rendering it much more probable that the solicitor was employed as the common solicitor of both. But exclude that fact and once establish that the soli-

1850.

WARDE

v.

WARDE.

citor was acting only for the party selling the estate, then I think that the circumstance of the party having the charge being the wife of the party selling, makes no difference. It makes it far more probable that the solicitor was employed for both ; but, in any other respect, I think it makes no difference at all. And, that being so, I come to the conclusion that there is nothing, here, which amounts to an admission that any of these documents are documents which the plaintiff is entitled to see. They are sworn, distinctly, by Mr. *Warde*, in his affidavit, to have been stated and taken on his sole behalf, and not on behalf of himself and any other person, which last words include his wife : and the only way in which that is attempted to be met, is the admission in the answer of Mr. *Warde* (and there is an exactly similar admission in the answer of Mr. *Bury*) that the Plaintiff had no separate solicitor or Counsel, and that she entered into the arrangement for the release of the *Warwickshire* estates and executed the indenture of September 1845, under the advice of Mr. *Warde's* solicitor and Counsel, and without any other legal advice. It does not at all follow that she entered into it in pursuance of certain opinions that her solicitor, or the party acting for her, had taken. It is only the advice of the solicitor, who, acting, in taking these opinions, for the husband, thought himself warranted in advising the wife to execute that deed, and she, upon that advice so given, does the act.

Whether, by amending the bill, any charge can be introduced showing that Mr. *Warde* either had actually acted as her agent, or led her to consider that he was acting as her agent in taking those opinions, is a matter on which I need not speculate. Such a case might be made ; but, in the present state of the pleadings, I think

that, if the Plaintiff had been a stranger, there is nothing to show that these cases were stated on her behalf, and that the circumstance of her being the wife of the Defendant, makes no difference. Consequently, this motion, so far as it relates to the documents alleged to be privileged, must be refused.

1850.

 WARDE
 v.
 WARDE.

BOWKER v. BULL.

BY an indenture dated the 11th of March 1836, the Defendant, *Bull*, mortgaged certain pieces of land, situate in *March* in the Isle of *Ely*, to *Elizabeth Stevens*, since deceased, in fee, for securing 400*l.* and interest. By an indenture dated the 3rd of March 1843, he mortgaged the same pieces of land, subject, expressly, to Mrs. *Stevens's* security, together with certain copyhold lands and drainage-securities, and his wife and two daughters, mortgaged certain freehold and copyhold hereditaments, of which the wife was seised for life with remainder to her daughters in fee, under the will of *Eleunor Ward*, to the Plaintiff, for securing 5600*l.* and interest: and that indenture, at the end of it, declared that, without prejudice to any of the rights or remedies of the Plaintiff, his heirs, executors, administrators, or assigns, as be-

1850:
 8th November
 and
 2nd December.

Mortgagor and mortgagee. Principal and surety. Redemption. Tacking.

estates, to *B.* to secure 6000*l.* lent by *B.* to *A.*, and the deed declared that, without prejudice to any of the rights or remedies of *B.*, his heirs, executors, &c., as between *A.*, his heirs, executors, &c., on the one hand, and the daughters, and their heirs, executors, &c., on the other hand, *B.*, his heirs, executors, &c., should be primarily liable to the payment of the 6000*l.*, and that his freehold and copyhold estates therein comprised should be primarily liable to answer and make good the 6000*l.* Six years afterwards, *A.* mortgaged his freehold and copyhold estates comprised in the prior mortgage, and also the drainage-bonds, to *B.*, to secure 700*l.* lent to him by *B.* Held that *B.* was not entitled, as against *A.'s* daughters, to tack his second mortgage to the first, but that the daughters were entitled to redeem the first mortgage on payment of the 6000*l.*

A. mortgaged his freehold and copyhold estates and some drainage bonds, and, by the same deed, his daughters mortgaged their freehold and copyhold

1850.

BOWKER

v.

BULL.

tween the Defendant *Bull*, his heirs, executors and administrators on the one hand, and *Bull's* wife and daughters and their respective heirs, executors and administrators on the other hand, *Bull*, his heirs, executors and administrators should be primarily liable to the payment of the principal and interest monies intended to be thereby secured; and that the freehold hereditaments thereinbefore described, but not comprising the hereditaments devised by the will of *Eleanor Ward*, and the copyhold hereditaments thereinbefore described and covenanted to be surrendered, not comprising any copyhold hereditaments devised by the said will, should be primarily liable to answer and make good the same principal and interest monies. On the 5th of March 1844, the Plaintiff took a transfer of Mrs. *Stevens's* mortgage. By an indenture dated the 9th of May 1849, *Bull* mortgaged, to the Plaintiff, all the freehold and copyhold hereditaments comprised in the before-mentioned securities of which he was seised, and also the drainage securities, for securing 700*l.* and interest.

Mrs. *Bull* died in August 1849.

Under the Orders of April 1850, the Plaintiff filed a claim against *Bull* and his two daughters, *Eleanor Ann* and *Sarah Elizabeth*, stating that, under an indenture dated the 3rd of March 1843, and made between *Joseph Bull* and *Susannah* his wife, since deceased, of the first part, their two daughters of the second and third parts, and the Plaintiff of the fourth part, and of an indenture dated the 5th day of March 1844, and made between *Richard Baxter*, the executor of Mrs. *Stevens*, of the first part, *William Watts*, the heir of Mrs. *Stevens*, of the second part, *Bull* of the third part, and the Plaintiff of the fourth part, and of an indenture dated the 9th

of May 1849 and made between *Bull* of the one part, and the Plaintiff of the other part, the Plaintiff was a mortgagee of certain freehold and copyhold or customary property therein comprised, and also assignee of certain indentures therein mentioned (being charges on certain taxes *), for securing, altogether, the sum of 6700*l.* and interest; and that the time for payment thereof had elapsed; and that *Bull* and his daughters were *entitled to the equity of redemption of the mortgaged premises*: and the Plaintiff, therefore, claimed to be paid the sum of 6700*l.* and interest and the costs of this suit; and, in default thereof to foreclose the equity of redemption of the mortgaged premises, and, for that purpose, to have all proper directions given and accounts taken.

1850.
 BOWKER
 v.
 BULL.

Mr. *Rolt* and Mr. *Toller*, for the Plaintiff, said that the drainage-securities were not mentioned in the declaration at the end of the deed of March 1843; and they contended that *Eleanor Ann Bull* and *Sarah Elizabeth Bull* were not entitled to redeem, except on payment of the 700*l.* and interest, as well as the 6000*l.* and interest.

Mr. *Bethell* and Mr. *Osborne*, for *Eleanor Ann Bull* and *Sarah Elizabeth Bull*, said that their clients were only sureties for their father; and that it was a well-established rule of a Court of Equity, that if a surety paid the debt of the principal debtor, he was entitled to the benefit of all the securities which the creditor held for the debt: *Copis v. Middleton (a)*: and that, it would be a violation of that rule to hold that their clients were not entitled to redeem the property comprised in the mortgage of March 1843, on payment

* The drainage-securities.

(a) Turn. & Russell, 224.

1850.

BOWKER

v.

BULL.

only of the principal and interest due on that mortgage. They referred also to *Wright v. Morley* (b).

Mr. *Cairns* appeared for *Bull*, and

Mr. *Shebbeare* for another party.

2nd December.

The VICE-CHANCELLOR :

This was a claim of foreclosure, by the Plaintiff, against Mr. *Bull* and his two daughters, as Defendants. I took time to consider a single point which was raised, in the argument, under these circumstances. By a deed of the 3rd of March 1843, made between *Joseph Bull* and *Susannah* his wife, of the first part, their two daughters and only children, *Eleanor*, *Ann Bull* and *Sarah Elizabeth Bull*, of the second part, and *William Bowker* of the third part, reciting the will of *Eleanor Ward*, under which Mrs. *Bull* was tenant for life of a certain messuage called *Westry House*, situate at *March* in the Isle of *Ely*, with divers lands adjoining, with remainder, after her death, to her two daughters, the said *Eleanor Ann Bull* and *Sarah Elizabeth Bull*, as tenants in common in fee ; and also reciting that *Joseph Bull* was seised in fee of two other estates in *March* or had an absolute power of appointing the same, subject only, as to one of such estates, to a mortgage in fee, to *Elizabeth Stevens*, for securing a sum of 400*l.* and interest : it was witnessed that, in consideration of a sum of 5000*l.* advanced and lent by *Bowker* to *Bull*, and for a nominal consideration, *Joseph Bull* and *Susannah* his wife and their two daughters, conveyed all the above-mentioned hereditaments, to *Bowker* in fee, subject, nevertheless, to a proviso for redemption

on payment of 5600*l.* and interest on the 3rd of March 1844. There was also a covenant to surrender, by way of further security, some copyholds held partly by Mrs. *Bull* and her daughters, under the will of *Eleanor Ward*, and, partly, by *Joseph Bull*, in connection with one of the before-mentioned freehold estates of which he was seised in fee. The deed also recites that *Joseph Bull*, in right of his wife, was entitled to indentures of assignment of taxes arising from fen lands in *March*; and then he and his wife assign these indentures, to *Bowker*, subject to the same proviso for redemption on payment of the before-mentioned sum of 5600*l.* and interest. The deed contains a power of sale,* by *Bowker*, in case of default in payment of the sum secured or the interest; and, finally, there is a proviso that, as between *Joseph Bull* on the one hand, and his wife and daughters on the other hand, *Joseph Bull* should be primarily liable to the payment of the 5600*l.* and interest; and the freehold and copyhold hereditaments of which he was seised in fee, should be primarily liable to the same. It appears that, in March 1844, *Bowker* obtained a transfer of the mortgage for 400*l.* made originally to *Stevens*; and he, thereby, undoubtedly became first mortgagee, of all the property, for securing 6000*l.* and interest. He is, therefore, clearly entitled to the ordinary decree of foreclosure of all the property comprised in his securities, as mortgagee for 6000*l.*

The question arises whether he is entitled to consider himself as first mortgagee, on all or any part of the property, for a further sum of 700*l.*, by reason of a deed of the 9th of May 1849, made between *Joseph Bull* of the

1850.
BOWKER
v.
BULL.

* This power was not noticed in the papers with which the Reporter was furnished.

1850.

BOWKER

v.

BULL.

one part, and *Bowker* of the other part, whereby, in consideration of 700*l.* paid by *Bowker* to *Bull*, he conveyed to him, by way of mortgage, all the property comprised in the prior securities of which he was seised in fee, and also the two assignments of taxes? On the part of the two children, it was contended that *Bowker* must be postponed to them so far as relates to this latter charge: and I think that they are right. The children are, according to what appears on the face of the deed of 1843, mere sureties for their father. *Bowker*, when he took his further charge in 1849, had full notice of this; and, therefore, he could only take subject to such rights as the daughters had acquired by reason of their having concurred in the former deed. Now it is quite clear that a surety paying off the debt of his principal, is entitled to a transfer of all the securities held by the creditor, in order that he may make them available against the debtor, as the original creditor might have done. On these grounds, the daughters were certainly entitled, on paying off the 6000*l.* mortgage, to have all the securities comprised in the deed of the 3rd of March 1843, made over to them, in order to enable them to reimburse themselves, out of their father's separate property comprised in that deed, whatever portion of the 6000*l.* they might have been obliged to pay: and this is a demand certainly prior, in point of date, to the last mortgage. It was urged, at the bar, on behalf of *Bowker*, that this right of a surety, is only a potential equity; which, though it may be asserted by the party himself, yet cannot bind third persons. But I cannot agree to this. The equity gives, to the surety, a right to call for a transfer of the securities, and so binds those securities into whatever hands they may come with notice of the charge.

It was then further contended that, whatever may be the rights of the parties as to the land, yet that the doctrine could not be extended to the indentures of taxes: for that the proviso at the end of the deed, though it stipulated for a priority as to the former, was silent as to the latter. I cannot, however, agree to the proposition that the parties, by expressly mentioning one part of the security, have become bound to forego their rights as to the rest. It will be recollected that the mortgage contains a power of sale; and the proviso might, perhaps, have had reference to that power; that is all. The parties might have meant to stipulate that, as between Mr. *Bull* and his children, the latter should be bound to resort for their indemnity, in the first instance, to the land, and to the indentures of taxes only in the event of the primary fund, the land, proving deficient. Be this, however, as it may, I do not think that the sureties, by expressly mentioning a part of their rights, can be deemed to have waived or lost the entire right given them by the doctrines of this Court. The result is that there must be the usual decree of foreclosure against all the parties, mortgagors, in the deed of 1843, as on a mortgage for 6000*l.*, and, in case the sum found due, is paid, then, if all or any part is paid by the daughters or either of them, the securities must all be transferred to them, and *Bowker* can only make his subsequent security available by redeeming them in the ordinary way.

This is the clear opinion I had formed after the hearing: but my attention was afterwards called, by Mr. *Lee* as *amicus Curie* to the cases of *Barnes v. Racster* (a) and *Bugden v. Bignold* (b); and also I was, anonymously referred to a case of *Higgins v.*

1850.
 —————
 BOWKER
 v.
 BULL.

(a) 1 Youn. & Coll. 401.

(b) 2 Youn. & Coll. 377.

1850.

BOWKER

v.

BULL.

Frankis, in the 10 Jurist 328, before Sir *James Wigram*; and I wished to have an opportunity, before I decided this case, of referring to these authorities. I have now done so; but I see no reason to alter the view of the case which I had previously taken. The two cases referred to in *Youn. & Coll.* were both cases where the same mortgagor had mortgaged different estates to various parties, some of whom had claims on one estate only, and others on all; and the question was as to the rights of the different subsequent mortgagees to throw the prior mortgagees on particular parts of their securities. But the doctrine there acted on by Vice-Chancellor *Knight Bruce*, does not seem to me applicable to a case like the present, of several mortgagors, and where the question is as to the right of the surety mortgagee, against his principal. The case in the Jurist before Sir *James Wigram*, is in strict conformity, as I understand it, with the principle on which I am now acting, except indeed that, there, Sir *James Wigram* directed the *Master* to inquire whether the party was a surety. That would be a perfectly useless inquiry here, and would only occasion unnecessary expense. It is not disputed that *Joseph Bull* alone is the principal debtor, and that the other parties are sureties. The decree must, therefore, give them a right, as mortgagees, against all the property of *Joseph Bull*, for whatever they may pay in redeeming the mortgage for 6000*l.*; and then *Bowker* will be foreclosed against them, unless on payment of what is due to them in respect of what they shall so pay in discharge of the 6000*l.* mortgage. If *Bowker* redeems them, the decree will go on, in the usual way, to direct an account of the principal and interest due to him on both mortgages, and, in default of payment, *Joseph Bull* will be foreclosed.

IN THE MATTER OF THE ACT FOR BETTER
SECURING TRUST-FUNDS AND FOR THE
RELIEF OF TRUSTEES.

EX PARTE MARY ELEANOR DICKSON.

1850 :
4th and 20th
November.

Condition.
Legacy.

WILLIAM DICKSON, a Major-General in the *East India* Company's service, made his will bearing date on the 4th of March 1848, and, partly, in the words and figures following :

"I bequeath the sum of 10,000*l.* sterling, unto my wife, *Harriett Dickson*, my son, *Samuel Auchmuty Dickson*, and my sons in law, *John Neeld*, Esq. and the Honourable *Mortimer Sackville West*, their executors, administrators and assigns, upon trust to invest the same, in their or his names or name, in the Parliamentary stocks of *Great Britain*, or at interest on Government or real securities in *Great Britain* or *Ireland*; and upon further trust to pay the annual produce thereof to my daughter, *Mary Eleanor Dickson*, for her life; and, after her decease, the said sum of 10,000*l.* and the stocks and securities thereof and the annual produce thereof, shall be in trust for all and every the child and children of my said daughter *Mary Eleanor Dickson*, who, being a son or sons shall respectively attain the age of 21 years, or, being a daughter or daughters, shall respectively attain that age or marry under that age, to be equally divided between or among them, if more than one, for their respective absolute

Testator gave a legacy in trust for his daughter for life, remainder in trust for her children who should attain twenty-one, remainder in trust for two of his sons absolutely: and he gave the residue of his personal estate to his other children. By a codicil, he declared that, finding that his daughter intended to become a nun, he revoked the bequest, in the event of her carrying her intention into effect, and excluded her from all reversionary advantages from his will. The daughter became a nun.—Held that the

condition annexed, by the codicil, was a lawful one; and that, though the bequest in favour of the daughter was merely revoked, and there was no gift over on breach of the condition, her interest under the bequest, ceased on her becoming a nun.

1850.

**DICKSON'S
TRUST.**

benefit : and, if there shall be but one such child, the whole to be for such only child absolutely : and, if there shall be no child of my said daughter, who, being a son, shall live to attain the age of 21 years, or, being a daughter, shall live to attain that age or be married, then the said sum of 10,000*l.* and the stocks and securities thereof, shall, subject to the trusts aforesaid, be in trust for my sons, *Samuel Auchmuty Dickson* and *William Thomas Dickson*, in equal proportions, absolutely." And the testator gave the residue of his personal estate, after payment of his debts, funeral and testamentary expenses and legacies, to the same trustees, in trust for his sons and his daughters *Harriett* and *Fanny*.

The testator made a codicil to his will, dated on the same day as his will, and partly as follows :

" In the distribution of my personal property in my said will, I left the sum of 10,000*l.* to my executors therein named, in trust to pay the interest of that sum to my daughter, *Mary Eleanor Dickson*, during her life, &c. &c.* But now finding that she contemplates remaining in a Roman Catholic convent and becoming a Nun, I, consequently, hereby declare that, in the event of her carrying out her intention of taking the veil, becoming a Nun, continuing to reside in a convent, or, in any other way, associating herself, permanently, with any Roman Catholic establishment of that nature, she would* forfeit all claim to a* benefit from the said sum of 10,000*l.*, and I hereby, in that case, revoke the said bequest ; and, in order to prevent any portion of my property from being appropriated to other purposes than the benefit of my family, I hereby exclude my said daughter, *Mary Eleanor Dickson*, from all reversionary* advantages whatever, from my said will.

* *Sic.*

* *Sic.*

* *Sic.*

The testator died shortly after the date of his will and codicil.

1850.
DICKSON'S
TRUST.

The trustees invested the legacy of 10,000*l.* in the purchase of 10,694*l.* Consols; and in March 1850 they transferred the stock into Court under the Act mentioned in the title to this case. In July following, *Mary Eleanor Dickson* presented a petition praying that the dividends, due and to become due on the stock, might be paid to her. Shortly afterwards, an affidavit was made by a clerk to the solicitor of the trustees, stating that, on the 3rd of April 1850, the deponent served *Mary Eleanor Dickson* with a notice, in writing, of the transfer and payment of the 10,000*l.*, into Court: that he served the notice on her at the Roman Catholic convent at *Hammersmith*, at which she then was and still continued, as the deponent had been informed and verily believed, an inmate: that, after the receipt of the notice, *Mary Eleanor Dickson* requested the deponent to wait until it had been shown to the Lady Abbess, in case any further information was required: that, at the time he served the notice, *Mary Eleanor Dickson* was dressed in the habit of a Nun, and appeared to have permanently associated herself with the said Roman Catholic establishment: that, in reply to an observation made, by him to the attendant at the convent, regarding the apparent ill health of *Mary Eleanor Dickson*, he was given to understand that such appearance was owing to the circumstance that Lent had just passed over, and that *Mary Eleanor Dickson* would then soon get better.

Mr. *Bethell* and Mr. *Fleming*,* in support of the petition, argued that this was a case in which, after a

* The arguments are reported *ex relatione*.

1850.
 DICKSON'S
 TRUST.

vested interest had been acquired by the legatee, a condition subsequent was added, under which that interest was sought to be divested, without any gift over of the legacy; and that, in such cases, the condition was considered in *terrorem* only: *Marples v. Bainbridge* (a), *Morris v. Burroughs* (b).

Mr. *James Parker*, for the residuary legatees, admitted that the condition was a condition subsequent, but contended that it was a revocation of the bequest upon such condition; and that there was no such rule as that, in order to make a condition subsequent effectual, there must be a gift over (c).

Mr. *Bethell* interposed, and said that the cases relating to real estate, had no application, the rule being derived from the civil law, and confined to personalty.

Mr. *James Parker*.—The rule of the civil law is not followed, although commonly referred to. In *Morley v. Rennoldson* (d), although the point in the cause was different, the Vice-Chancellor *Wigram* spoke of the rule of the civil law in these terms: "The rule of the civil law was referred to in the argument, as it has usually been on questions of this nature: but that law, founded, as Lord *Loughborough* observes, on social maxims and public polity so essentially different from our own, as to render it difficult to conceive how it could have been adopted by our Courts on this subject, has not been followed with regard to conditions operating in restraint of marriage. The extent to which the civil law has been gradually departed from, is to be collected

(a) 1 Madd. 590.

Jarman, 3rd edit. p. 295.

(b) 1 Atk. 399, see 404.

(d) 2 Hare, 570; see 578.

(c) 2 Powell on Devises, by

from Lord *Thurlow's* judgment in *Scott v. Tyler*. In the English law, a distinction has been taken between the cases in which the restraint operates as a condition precedent, and those in which it is expressed to take effect as a condition subsequent. A distinction has also been made as to whether it is a particular restraint (a partial and reasonable restraint), or whether it is a general restraint, and the decision is, generally, made to depend upon the question whether there is a gift over or no gift over. In *Stackpole v. Beaumont*, Lord *Loughborough* appears to have said that such was the state of the authorities, a judge could not be considered to act too boldly whichever side of the proposition he should adopt."

1850.
DICKSON'S
TRUST.

The cases, Mr. *Parker* continued, in which the condition has been disregarded, are cases where it was attempted to impose a restraint which was illegal, or contrary to public policy: a ground which does not apply to this case. Here the intention is clear, and there is no objection, in law, to giving effect to it: *Lloyd v. Branton* (e).

Mr. *Elmsley* appeared for other parties.

Mr. *Bethell*, in reply, said that the cases in which the condition was ineffectual and regarded as *in terrorem* only, were not merely those in which the condition was also bad in law. If that were so, there would be no necessity to resort to the argument, that the gift was *in terrorem*, or that a gift over was needed to make it valid. It would be sufficient to refer to the condition itself. But Lord *Hardwicke*, distinctly, said that, in the case of

1850.
 DICKSON'S
 TRUST.

legacies, "admitting there is no devise over, then the question will be, whether the condition is *in terrorem* only" (f).

The VICE-CHANCELLOR :

This was the petition of *Mary Eleanor Dickson*, presented under the Act of 10 & 11 Vict. c. 96. It states, &c. &c., and it prays, &c. &c.

The relief asked would be matter of course, if the title of the petitioner had rested on the will alone, under which she, certainly, took an interest for her life in the funds in question. But the question is, how far that interest is affected by the codicil ; it being admitted, at the bar, by the Counsel for the petitioner, that she has associated herself, permanently, with a Roman Catholic establishment in the nature of a convent ; and so has brought herself within the purview of the clause of forfeiture contained in the codicil.

The first point for inquiry, is what, under the circumstances which have happened, are the intentions of the testator as expressed on the face of the will and codicil. On this point there cannot, I conceive, be any doubt whatever. The testator, in terms, says : " If my daughter associates herself, permanently, with a Roman Catholic establishment, then I revoke the bequest in her favour of 10,000*l.* ;" that is : " On such an event occurring, my will is to be read as if it had contained no such bequest." It is impossible for an intention to be more clearly expressed.

The intention then being clear, the next question is

(f) 1 Atk. 379.

whether it is a lawful intention! What doubt can exist on this point? It is surely competent, to a testator, by a clause properly framed, to limit the interest which he gives to his daughter, to such a time as she shall remain unconnected with a convent. And, if this may be lawfully done by an original limitation of the interest given, there can be nothing unlawful in a clause framed for bringing about the same result by means of a condition subsequent. Independently, therefore, of authority, I should have thought the case was free from doubt. The intention, it is admitted, is a lawful intention, and expressed so as to leave no doubt as to what it is. Why is the Court not to carry it into effect? The ground relied on by the petitioner, is a supposed rule of Law, that, whenever a legacy is given absolutely in the first instance, but followed by a declaration that it shall be forfeited, or that it is revoked if the legatee does not comply with some condition subsequent mentioned in the will, there, unless on the non-compliance with such condition the legacy is given over, the clause of forfeiture or revocation is inoperative, being treated as a mere idle threat to induce the legatee to comply with the condition, and not really to affect the bequest. I do not, however, think that any such rule of Law exists. The argument in favour of the existence of such a rule, was derived from a supposed analogy between the case put, and a case of a bequest which the testator has declared shall be forfeited on the marriage of the legatee. In such cases, there are, no doubt, very numerous authorities for the proposition that the legatee takes an absolute legacy, and that the condition subsequent attempting to defeat it on the legatee contracting marriage, is void. The condition is said to have been introduced by the testator, merely *in terrorem*, and not to have been intended really to affect the interest of the legatee. It

1850.

DICKSON'S
TRUST.

1850.
DICKSON'S
TRUST.

is impossible to refer to the numerous cases on this subject, without feeling that the Judges, in deciding them, have never felt very sure of the ground on which they were treading. It is, however, certain that the decisions have proceeded on maxims of the Civil, not the Common Law. Now, by the Civil Law, any condition in restraint of marriage was considered as a condition *rei non licitæ*, and, therefore, in whatever form imposed, it was held to be null and void. The subject is discussed in the 35th Book of the Pandects, cap. 33, *et seq.* to which it is sufficient to refer. Inasmuch, therefore, as legacies may be sued for and recovered in the Ecclesiastical Courts, where the rule of the Civil Law would prevail, this Court has felt itself bound to conform to that Law, in order that there might not be a conflict of decision in the two Courts. In cases, therefore, where a legacy has been given, coupled with a condition that the legatee shall not marry, then this Court has felt bound to hold that the testator could not really have meant what he has said; or, if he did mean it, then that he meant to prohibit what he had no right to prohibit; and so that his expressions must be considered as merely indicating his wishes, and, so far as they import a forfeiture of the bequest, used merely *in terrorem*. The rule itself, and the reasoning upon it, and the grounds which have been relied on as taking cases out of its operation, have been often stated to be very unsatisfactory: but the rule is established, and it would be very unsafe to call it in question in cases to which it applies. But I do not think that this is such a case. The rule depends, for its principle, not merely on the form in which the intention is expressed; not merely on its being a condition subsequent; but, also, on the nature of the condition which is to determine the legacy. If the condition, being a condition subsequent, be in the

class of those which impose a restraint considered, by the Civil Law, as unlawful, there, if the condition be a simple prohibition, or a prohibition with a declaration of forfeiture of the legacy, without more, the rule of the Civil Law prevails: "*Remittur conditio*;" and the legacy stands as if no such condition had been found in the testament. If, on the other hand, there be something beyond a condition and clause of forfeiture; if the forfeited legacy is, on breach of the condition, given over, or, which is the same thing, is directed to become part of the residue, and that residue is given over, then this Court disregards the doctrine of the Civil Law, and acts on its own ordinary rules. The legatee over becomes entitled, and the original legatee loses his legacy. It is not necessary to inquire whether this doctrine can, under any circumstances, be applicable to the case of a condition precedent. The same rule which prevails in the case of legacies which are revoked on the marriage of the legatee, prevails, also, in the case of a legacy made void in case the legatee should dispute the will of the testator, and, on the same ground, namely, that the condition has been considered, whether justly or not it is unnecessary to inquire, as contrary to the policy, or, according to the language of the Touchstone, page 132, against the liberty of the Law. Such a condition, therefore, like a condition in restraint of marriage, has been considered as a *conditio rei non licitæ*; and, so, has been treated as a mere clause *in terrorem*, unless where there has been a gift over on the condition being broken. On similar grounds, a condition subsequent defeating a legacy on the legatee alienating it or permitting it to become liable to distribution among his creditors in bankruptcy, has been held inoperative. Such a restriction is an endeavour to deprive the legatee of one of the ordinary incidents of property, and, so, contrary to the policy of the Law; and, in such cases, therefore, where

1850.
DICKSON'S
TRUST.

1850.

DICKSON'S
TRUST.

there has been no gift over, the condition subsequent has been treated as inoperative.

Now, in the present case, there is, certainly, no gift over. There is merely a revocation of the legacy on the happening of the event which has occurred, namely, the legatee associating herself with a Roman Catholic establishment. If, therefore, this was to be treated (like a condition in restraint of marriage, or a condition not to dispute the will, or not to aliene,) as a condition *rei non licitæ*, the doctrine to which I have referred would apply. The testator would have been treated as merely expressing, strongly, his wish on a subject on which he had no right to impose restraint; and that expression of wish would have been inoperative. But the condition here imposed, is a perfectly lawful condition. There is neither principle nor authority for saying that a parent may not make a provision for his daughter, cease on her taking the veil or becoming permanently connected with a convent. The condition is *conditio rei licitæ*; and so the rules derived from conditions in restraint of marriage or otherwise against the liberty of the Law, are inapplicable. That being so, I can discover no principle or authority for saying that this Court is not to give full effect to the intention, because it is contained in a condition subsequent. All we have to do, is to ascertain what, in the events which have happened, is the meaning of the testator as expressed on the face of his will. As to this there can be no doubt. That state of circumstances has occurred in which the testator expressly says he does not mean his daughter to have any interest in the 10,000*l.*; and I am, therefore, of opinion that she is not entitled to it. The petition must therefore be dismissed (*g*).

(*g*) See *Cooke v. Turner*, 14 Sim. 493.

The question being one relating solely to the trust of this particular legacy, the costs must come out of the fund which has given rise to the necessity for an application to the Court.

1850.
DICKSON'S
TRUST.

BIRD'S CASE.

IN THE MATTER OF THE WINDING-UP OF
THE INDEPENDENT ASSURANCE COM-
PANY.

1850 :
21st Nov.
Joint-stock
Companies
Winding-up
Acts.
Contributory.

THE 7th section of the Joint-stock Companies Registration Act (7th & 8th Vict. c. 110), enacts that no joint-stock company shall be entitled to receive a certificate of complete registration, unless it be formed by some deed or writing under the hands and seals of the shareholders therein; and, in or by such deed, there must be appointed not less than three directors and also one or more auditors, and such deed must set forth in a schedule thereto, in a tabular manner, according to the order hereinafter mentioned, the following particulars; that is to say, 1, the name of the company; and also, 2, the business or purpose of the company; and also, 3, the principal or only place for carrying on such business, and every branch office (if any); and also, 4, the amount of the proposed capital and of any proposed additional capital, and the means by which it is to be raised; and, where the capital shall not be money, or shall not consist entirely of money, then the nature of such capital and the value thereof shall be stated; and also, 5, the amount of money (if any) to be raised or authorized to be raised by loan; and also, 6,

After the registrar of joint-stock companies had granted a certificate of the complete registration of a company, an order was made for winding up its affairs. The *Master* excluded the name of a shareholder from the list of contributories, because the deed of settlement had not been executed by the number of covenanting shareholders required by the Joint-stock Companies Registration Act. But the Court ordered his name to be restored.

1850.

BIRD'S
CASE.

the total amount of the capital subscribed or proposed to be subscribed at the date of such deed ; and also, 7, the division of the capital (if any) into equal shares, and the total number of such shares, each of which is to be distinguished by a separate number in a regular series ; and also, 8, the names and occupations and (except bodies politic) the places of residence of all the then subscribers, according to the information possessed by the officers of the company in respect of such names and occupations and places of residence ; and also, 9, the number of the shares which each subscriber holds, and the distinctive numbers thereof, distinguishing the numbers of the shares on which the deposit has been paid from those on which it has not been paid ; and also, 10, the names of the then directors of the company, and of the then trustees of the company (if any), and of the then auditors of the company, together with their respective places of business (if any), occupations and places of residence ; and also, 11, the duration of the company, and the mode or condition of its dissolution : And that such deed must contain a covenant on the part of every shareholder, with a trustee on the part of the company, to pay up the amount of the instalments on the shares taken by such shareholders, and to perform the several engagements in the deed contained on the part of the shareholders ; and that such deed must also make provision for such of the purposes set forth in schedule (A.) to this Act annexed, as the nature and business of the company may require, and either with or without provision for such other purposes (not inconsistent with law) as the parties to such deed shall think proper ; and that every such deed of settlement *must be signed by, at least, one fourth in number of the persons who at the date of the deed have become subscribers, and who shall hold, at least, one fourth of the*

maximum number of shares in the capital of the Company; and that every such deed must be certified by two directors of the Company, by writing indorsed thereon in the form contained in the schedule (B) to this Act annexed; and that, on the production of such deed, setting forth such matters and making such provisions as are hereby required to be provided for, and, being so signed and certified together with a complete abstract or index thereof, to be previously approved by the Registrar of Joint-stock Companies, and also a copy of such deed, for the purpose of registering the same, or as soon after such production as conveniently may be, the Registrar of Joint-stock Companies shall grant a certificate of complete registration, according to the provisions of this Act in that behalf; and, unless such deed and other matters be so produced, and such conditions be so performed, it shall not be lawful for him to grant such certificate; and that, after such certificate shall be granted, it shall be taken as evidence of the proper provisions being inserted in such deed, and of the performance of the conditions hereby required previously to the granting such certificate of complete registration; and that any defect or omission as regards the matters hereby required, in any deed of settlement, may, from time to time, be supplied by a supplementary deed or deeds; and that, if any such supplementary deed be not inconsistent with or repugnant to this Act, or any Act respecting Joint-stock Companies, and if it be duly registered, then it shall have the same effect as if there were only one deed for the purposes of this Act; and that, unless the same shall be registered, it shall be of no force or effect.

1850.

BIRD'S
CASE.

The Company, in this case, was provisionally registered on the 13th of February 1847, and com-

1850.

BIRD'S
CASE.

menced business shortly afterwards. On the 19th of October 1848, the Registrar granted a certificate of the complete registration of the Company. At that time the deed of settlement was signed by one fourth, in number, of the subscribers to the capital of the Company; and they held, amongst them, 2020 shares, which was twenty more than one fourth of the maximum number of shares in the capital. But, as more than twenty of those shares were held by the trustee of the Company, with whom the covenants in the deed were entered into, but who did not, himself, enter into any covenant, the *Master* who was charged with the winding-up of the Company, was of opinion that the complete registration of it was unlawful, and, on that account, excluded *Bird's* name from the list of contributories.

A motion was now made, on behalf of the Official Manager of the Company, that *Bird's* name might be restored to the list.

Mr. *Bethell* and Mr. *Roxburgh*, in support of the motion, cited *The Banwen Iron Company v. Barnett* (a); which, they said, was a conclusive authority that, after the certificate of the complete registration of a Company has been obtained, no defects in the deed of settlement, can be set up: and that, if the Company in this case, had been only provisionally registered, *Bird's* name ought not to have been struck out of the list of contributories.

Mr. *Calvert* and Mr. *Baggallay*, for *Bird*, produced an extract from the deed of settlement of the Company

(a) 19 Law Journal Reports of Cases in Court of Common Pleas, page 17.

with the schedule thereto, authenticated by the Registrar of Joint-stock Companies;* from which it appeared that the deed recited that the Company was intended to be completely registered as soon as such registration could be had, and that the shares held by the parties to the deed, exclusive of the trustee, were less than one fourth of the maximum number of shares. They referred to the 7th, 8th and 25th sections of the Registration Act, and said that the deed had reference to a completely registered Company; but, as the covenants in it had not been entered into by the holders of a sufficient number of shares, (which appeared from the documents produced,) the Company had never been duly, completely registered; and that the defect in this case, could not be supplied by a supplemental deed: consequently, the object for which *Bird* had subscribed to the capital of the Company, could not be obtained; and, therefore, the *Master* had properly excluded his name from the list of contributories.

1850.
BIRD'S
CASE.

The VICE-CHANCELLOR, having asked, in the course of the argument for the Respondent, how persons who had had dealings with the Company, were to find out whether the certificate of complete registration had been properly granted or not, delivered the following judgment:

The seventh section of the Joint-stock Companies Registration Act, enacts that no Joint-stock Company shall be entitled to receive a certificate of complete registration, unless it be formed by some deed or writing under the hands and seals of the shareholders. It then

* In *The Banwen Iron Company v. Barnett*, the deed of settlement was not before the Court. See Mr. Justice *Maule's* judgment.

1850.

BIRD'S
CASE.

prescribes that the deed shall contain, amongst other things, a covenant on the part of every shareholder, with a trustee on the part of the Company, to pay up the amount of the instalments on the shares taken by such shareholder, and to perform the engagements in the deed contained on the part of the shareholders ; and that it must be signed by at least one fourth in number of the persons who, at the date of it, have become subscribers and who shall hold, at least, one fourth of the maximum number of shares ; and that it must be certified by two of the directors ; and that, on the production of it, together with an abstract or index of it to be previously approved by the Registrar, and also a copy of it for the purpose of registering the same, or as soon after as conveniently may be, the Registrar shall grant a certificate of complete registration ; and that, unless such deed and other matters be so produced, and such conditions be so performed, it shall not be lawful, for the Registrar, to grant the certificate. Now suppose that, after the Registrar had granted a certificate of the complete registration of a Company, it should turn out that the Registrar, on the deed being produced to him, had miscounted the names of the executing shareholders, and that only 1999, instead of 2000, the proper number, had signed it, it would be monstrous to hold, as Mr. Justice *Maule* says in the case of *The Banwen Iron Company v. Barnett*, that all the acts and contracts of the Company since their supposed incorporation, were null and void. I think that that would not be a reasonable construction of the Act. But, if I had any doubt upon the subject ; if I had entertained an opinion upon it, directly the reverse of that which I do entertain, I should have considered myself concluded by the decision in the case to which I have referred. It is as strong a case as can be. I see no difference, in principle, between the omission of matters which

are pointed out in the schedule to the Act, and the omission of those which are pointed out by the Act itself. And, if there were any such difference, the plea in that case does not raise any such distinction. The action was for calls; and the plea was &c. &c.

1850.

BIRD'S
CASE.

[His Honour read the plea.] The Court held that to be no plea at all; that, notwithstanding the omission to state that, without the statement of which the Registrar ought not to have given a certificate of complete registration, yet, he having done so, the Company were enabled to sue for the calls which the statute, united with the deed, enabled them to sue for. If the Company could sue, it follows, as a matter of course, that now, when the affairs of the Company are to be wound up, there can be calls made, by the Official Manager, upon those who might have been called upon, by the Company, to contribute to the Company itself.

It seems to me a perfectly clear case; and I entertain but little doubt that, if this case of *The Banwen Iron Company v. Barnett* had been before the Master, he would not have reported as he has done. It is, in *omnibus*, the same case as the present. Therefore I shall order *Bird's* name to be replaced on the list of contributories; but I shall make no order as to costs.

Robson v. In Charge. In R. 1825

1850:
9th Nov.

*Joint-stock
Companies
Winding-up
Acts.*

*Secretary's
salary.
Agreement.
Construction.*

COPE'S CASE.

IN THE MATTER OF THE WINDING-UP OF THE INDEPENDENT ASSURANCE COM- PANY.

MR. COPE had been appointed secretary to the Company, at a salary of 400*l.* a year, to commence on the 25th of March 1848; and, on the 2nd of November 1848, he signed an agreement, (which had been drawn up in pursuance of a resolution of the directors,) that no director or shareholder of the Company should be personally responsible for the salaries of any of the officers of the Company, and that no officer should obtain payment for his services, until a sufficient sum should be obtained, *by the funds of the Company*, for that purpose.

Cope continued to act, as secretary to the Company, until the 23rd of February 1850, when the winding-up order was made. Under that order, he claimed to be paid two years' salary for the time he had acted, and another year's, on the ground that the directors had not given him any notice of their intention to discontinue his services. The *Master* wholly disallowed the claim.

Mr. Bethell and Mr. Roxburgh, for Cope, now moved

• *A.*, who had been appointed secretary to a Joint-stock Company at a yearly salary to commence on the 25th of March 1848, signed an agreement that no director or shareholder of the Company, should be personally responsible for the salaries of any of the officers; and that no officer should be paid for his services, until a sufficient sum should be obtained, *by the funds of the Company*, for that purpose. An order for winding up the Company was made on the 23rd of Feb. 1850. Held that the agreement did not exonerate the shareholders from liability to contribute, *as members of the Company*, to the payment of arrears of salary due to the secretary; and that though he was not, in strictness, entitled to more than a portion of his salary for the second year, yet, as he had served for nearly the whole of that year, it was but reasonable to allow him his salary for the whole of it.

that the *Master's* decision might be reversed. They said that the *Master* had put this extraordinary interpretation on the words, "the funds of the Company," in the agreement, namely, that they meant, "the profits of the Company;" and, as there were none, had disallowed the claim. They contended, first, that the true meaning of the agreement was, that no member of the Company should be made responsible, individually, for the salaries of the officers; and secondly, that, as *Cope's* engagement was a yearly one, he could not be discharged without receiving a year's notice, or a year's salary in lieu of it: *Beeston v. Collyer* (a).

1850.

COPE'S
CASE.

Mr. *Rolt* and Mr. *Speed*, for the Official Manager, argued in favour of the *Master's* construction of the agreement, and said that, "the funds of the Company," meant funds to arise from premiums on policies effected with the Company, or otherwise in the course of carrying on the business of the Company: that there were no funds of the Company: that they had all been exhausted; and, therefore, *Cope's* salary could not be paid without calls being made upon the shareholders, which would be contrary to the agreement: that, at all events, *Cope* was not entitled to more than his salary for the first year, and a proportionate part of it for the second year, in analogy to the practice in bankruptcy.

The VICE-CHANCELLOR :

I have no doubt that the meaning of the agreement is that the officers of the Company shall not sue any particular member of the Company for his salary, and say: "You are the person who employed me." It exonerates the members from personal liability: but it

(a) 4 Bing. 309.

1850.

COPE'S
CASE.

does not exonerate them from liability, as members of the Company, to contribute whatever they were bound to contribute, by contract with the Company.

With respect to the other question, my opinion is that, in strictness, Mr. *Cope* is not entitled to his salary for more than the first year and about eleven months of the second year. But, as he served, nearly for the whole of that year, I think that it will be but reasonable to allow him his salary for the whole of it : and, therefore, I shall admit his claim to the extent of 800*l*.

1850 :
14th Nov.

Practice.
Dismissal.

STUART v. LLOYD. *

THE time at which the answer in this case was to be deemed sufficient, expired on the 5th of July : on the next day, the Plaintiff filed exceptions to it, for impertinence.

After an answer was to be deemed sufficient, the Plaintiff filed exceptions to it, for impertinence. Held that the pendency of those exceptions did not prevent the Defendant from moving to dismiss the bill for want of prosecution.

Mr. *Phillips*, for the Defendant, now moved to dismiss the bill, for want of prosecution. He said :

The pendency of exceptions for impertinence, is no answer to an application to dismiss ; otherwise, as no time is limited for referring exceptions for impertinence, the Defendant might be prevented, for ever, from getting the bill dismissed. Besides, these exceptions were not filed till after the answer was to be deemed sufficient. Even if these exceptions are allowed, and the passages excepted to, struck out, the answer will still be sufficient.

* *Ex relatione.*

Mr. *Bethell* and Mr. *Bazalgette*, for the Plaintiff.

1850.

By expunging the impertinence, the answer may become insufficient: we have filed our exceptions, and the bill ought not to be dismissed till they are disposed of.

STUART
v.
LLOYD.

The VICE-CHANCELLOR :

It may be that, by striking out the impertinent matter, you will make the answer insufficient: but still I think that, within the meaning of the 16th Order of 1845, the answer must be taken to be sufficient and cannot be made otherwise, and the Plaintiff is right in moving.

IN THE MATTER OF THE JOINT-STOCK
COMPANIES WINDING-UP ACTS, AND OF
THE BOSTON, NEWARK AND SHEFFIELD
RAILWAY COMPANY.

1850 :
16th and 18th
Nov.

*Joint-stock
Companies
Winding-up
Acts.*

EX PARTE WILLIAMS.

THE above-mentioned Company was provisionally registered in August 1845. The capital of it was to be 1,600,000*l.* in 64,000 shares of 25*l.* each; and the

A provisionally registered Railway Company having abandoned their un-

dertaking, the directors made two payments to the shareholders in part return of their deposits; and they offered to make a third *and final* payment, which the whole or nearly the whole of the shareholders, except *A.*, accepted. All the debts and liabilities of the Company were discharged, and all the assets of it were exhausted; and *A.* applied for and received the second payment, as being one of the shareholders who had concurred in the dissolution of the Company. Nevertheless he, being dissatisfied, as he alleged, with the directors' accounts, petitioned for an order for the dissolution and winding-up of the Company, or for winding it up if it had been already dissolved.

The Court refused to make the order at once, and directed the *Master* to inquire and state whether it was necessary or expedient that the Company should be dissolved and wound up, or wound up.

1850.

EX PARTE
WILLIAMS.

deposit was to be 2*l.* 12*s.* 6*d.* per share. The petitioner took one hundred shares in the scrip of the Company, and paid the deposits on them; and he executed the parliamentary contract and the subscribers' agreement, as did the other allottees of shares. But, the Company having failed in their attempts to obtain an Act of Parliament for making their Railway, owing to the Standing Orders not having been complied with on their behalf, they abandoned their project; and the directors paid to the petitioner and other shareholders, first 1*l.*, and, afterwards 10*s.* per share, in part return of their deposits.

The latter payment was made out of stock of the Midland Counties Railway Company, a competing Company, which the *Boston, Newark, and Sheffield* Railway Company had received in consideration of the abandonment of part of their line. Before that stock was distributed, the secretary of the Company sent a circular letter to the petitioner and other shareholders, which was, partly, as follows: "*Scrip*holders *who concur in the dissolution of the undertaking*, and wish to receive the Midland stock, are requested to send, to the secretary, for forms of application; which they are requested to fill up, sign and forward, with their scrip certificates, to No. 1 *Little George Street, Westminster*, on or before the 29th of September 1846. After that date, these offices will be finally closed, and all subsequent communications, on this and every other business of the Company, must be addressed to *Mansfield, Notts.* The scrip certificates will be returned to the holders, after they have been marked and recorded, and the Midland stock will be issued as soon as it can be got ready." On the 15th of November 1848, the chairman of the Company sent the petitioner a statement of the accounts

of the Company, together with a form of application for the final return of 1s. 6d. per share; and a letter requesting the petitioner to return the form properly filled up, with his scrip certificates, and adding that, in exchange for them, a cheque would be sent, to him, for the amount of the return. But the petitioner being, as the petition alleged, dissatisfied with the accounts, and, more especially, in reference to the gross and exorbitant items for solicitors, parliamentary expenses, engineering and surveying, and the application of 13,528*l.* for the purchase of one hundred and fifty shares in the *Mansfield* and *Pinxton* Railway (with which the Company had no concern) and the loss occasioned by the holding of eighty-six 50*l.* Midland shares, and other departures and improper payments by the directors, refused to accept the final dividend. The petition further alleged that the petitioner believed that there were liabilities of the Company for which the members of it were or might be liable: that the Company had ceased to carry on any business, and the project had been entirely abandoned; and the secretary, and clerks, discharged; but the affairs of it had not been wound up: that the petitioner believed that there was, in the possession of the directors, a large amount of money arising from the deposits paid by the contributories, and which was available for distribution amongst them; and that the sums arising from deposits had been misapplied: that the petitioner was one of the contributories, and that he and the other contributories were desirous that the affairs of the Company should be wound up, and that the Court should declare that the Company was or ought to be dissolved. The petition prayed for an order for the dissolution and winding-up of the Company; or, if it should have been already dissolved, for the winding of it up.

1850.

EX PARTE
WILLIAMS.

1850.

EX PARTE
WILLIAMS.

The late chairman of the Company, made an affidavit, in opposition to the petition, stating that the allegation in the petition, as to the gross and exorbitant items for solicitors, parliamentary expenses, engineering and surveying was not true, inasmuch as the bills of the engineers, solicitors and surveyors were very heavily mulcted, and as great deductions made therefrom as the directors were advised would be safe and prudent: that one of the clauses in the agreement entered into, by the shareholders with the Company, on the 14th October 1845, expressly empowered the provisional directors, to purchase, out of the deposits, all or any of the shares in the *Mansfield and Pinxton* Railway, at such prices as they should be able: *that there were no liabilities existing against the Company or any member thereof, in respect of any debt due or alleged to be due by the Company: that not a shilling of the assets of the Company was left, and none of the directors had any money belonging to the Company, in their hands, nor was any standing to the credit of the Company, at its late bankers'*: that, previous to the distribution of the Midland stock, a circular was drawn up, by the said Railway,* and forwarded to all the shareholders thereof, requesting them to send, to the secretary of the railway, for forms of application, as shown in the petition; and *that the petitioner, in conjunction with 63,449 out of the whole 64,000 shareholders, sent in his application concurring in the dissolution of the Company: that the holders of 56,271 shares, had received the 1l. 10s. per share, and the final dividend of 1s. 6d. per share, in discharge of their deposits, and had consented to the winding-up of the undertaking; and the deponent believed that by far the majority of the remaining outstanding shares, were lost or destroyed.*

* Sic.

Mr. *Bethell* and Mr. *Wright*, (Mr. *Terrell* was with them,) in support of the petition said that the petitioner was one of the contributories, and that, as such, he was entitled to the usual order for winding up the affairs of the Company.

1850.
EX PARTE
WILLIAMS.

Mr. *Selwyn*, (Mr. *Rolt* was with him,) for the late chairman of the Company, submitted that there was no ground for putting the contributories to the expense which would be incurred by winding up the affairs of the Company; and that, before the matters complained of by the petition, would be investigated, the *Master* would have to settle a long list of contributories, not one of whom, except the petitioner, sought to disturb the existing arrangement: and he cited *Ex parte Pocock* (a), *Ex parte Murrell* (b), and a case recently decided by Vice-Chancellor *Knight Bruce*, *In the matter of the London, Newbury and Bath Railway Company* (c). He added that the petitioner might bring an action, or file a bill against the directors, if he thought fit so to do: that, with the exception of the small sum of 112*l.* 10*s.*, the whole amount of his deposits had been returned to him: that no assets of the Company remained to be got in: and that no one was suing or could sue the petitioner as a member of the Company; for all the debts and liabilities of the Company had been discharged.

Mr. *Bethell*, in his reply, said that, in *Ex parte Pocock*, a very large majority of the shareholders, had released the directors.

The *Vice-Chancellor*, after having perused the affida- 18th November.

- (a) 1 De Gex & Smale, 731. (b) 3 De Gex & Smale, 4.
(c) The Law Times for 16th November 1850.

1850.

EX PARTE
WILLIAMS.

vits in support of and in opposition to the petition, said that there were three courses for the Court to adopt : either to dismiss the petition ; to make an order according to the prayer of it ; or to direct a preliminary inquiry to be made by the *Master*, as the late *Vice-Chancellor of England* had done : that he thought that, under the circumstance of this case, the last course ought to be adopted ; and, therefore, he should direct the *Master* to inquire and state whether it was necessary or expedient that the Company should be dissolved and wound up, or be wound up : and that he should reserve the question of costs, and give liberty to apply.*

* The above petition had been heard by the late *Vice-Chancellor of England*, who made a similar order upon it on the 26th of March 1850. Two days afterwards, the Registrar's office was closed for the Easter vacation, and was not re-opened until the 8th of April. On the 13th of that month, the petitioner left his brief, in the office, for the purpose of the order being drawn up ; but it was then too late for him to advertise the order, as the 15th section of the Winding-up Act of 1848 requires, in the *London Gazette*, within twelve days after the date of it ; and, for that reason, he procured the petition to be reheard.

HAWKINS v. GATHERCOLE.

BY an indenture dated the 8th of August 1845, the Defendant, *M. A. Gathercole*, clerk, made a mortgage in fee to the Plaintiff, for securing the repayment of 24,500*l.* on the 8th of August 1852, with interest in the mean time at 4*l. per cent.* That mortgage purported to comprise the advowson of the Vicarage of *Chatteris Nuns* in the Isle of *Ely*, together with the parsonage-house and out-houses thereto belonging, and all other houses, out-houses, edifices, buildings, glebe-lands, allotments of land in lieu of glebe-lands, meadows, commons, tithes of what kind soever, corn-rents, rents in lieu of tithes, and all other rents of what kind soever, offerings, fruits, oblations, obventions, pensions, portions, and all other commodities, emoluments, hereditaments and appurtenances whatsoever, to the advowson belonging, or, in anywise, appertaining: and it contained a power enabling or purporting to enable the Plaintiff to sell the premises in case default should be made in payment of the 24,500*l.* or the interest thereof, and also a covenant, by the Defendant *M. A. Gathercole* with the Plaintiff, for the payment of the principal and interest: and, for further securing such payment, *Gathercole* executed a warrant of attorney on which a judgment for 49,000*l.* was entered up against him and was registered on the 5th of September 1845, and, afterwards, re-registered.*

At the date of the mortgage-deed, *Gathercole* was

1850:
21st Nov.

Debtor and creditor.
Judgment debt.
Beneficed clergyman.
Statute of
1 & 2 Vict.
c. 110, s. 13.
Receiver.

A judgment, entered up, in 1845, against a beneficed clergyman, for a debt, was duly registered. Held that, under the 1 & 2 Vict. c. 110, s. 13, it was a charge upon his benefice, and that the creditor was entitled to have a receiver of the profits of the benefice appointed.

* See 1 & 2 Vict. c. 110, s. 19, and 2 & 3 Vict. c. 11, ss. 2 and 4.

1850.

HAWKINS

v.

GATHERCOLE.

not the incumbent of the Vicarage, but he became so shortly afterwards.

In September 1849, the interest on the mortgage-debt being in arrear, the Plaintiff issued a *fi. fa.*, to the sheriff of *Cambridgeshire*, for the recovery of the arrear; but the sheriff was unable to levy the whole of it. In consequence of which, the Plaintiff, in November following, issued a writ of sequestration to the Bishop of *Ely*, commanding the Bishop to sequester the Vicarage until he should have levied the whole of the sum for which the judgment had been entered up, (except what the sheriff had levied,) out of the rents, tithes, oblations, obventions, fruits, issues and profits, and other ecclesiastical goods of *Gathercole* in the Bishop's diocese.

The bill was filed against *Gathercole*, the Bishop of *Ely* and certain judgment-creditors of *Gathercole*, whose judgments were subsequent to the Plaintiff's, and who had issued sequestrations thereon against the Vicarage. It prayed, amongst other things, for a declaration that the Plaintiff was entitled to be paid his mortgage-debt and interest in priority to the judgments of the other judgment-creditors, and that his judgment became and was a *charge upon the before-mentioned Vicarage, advowson, tithes, rents, hereditaments and premises*, against them; that the Bishop might be restrained from executing the sequestrations issued by the other Defendants, and that those Defendants might be restrained from procuring their sequestrations to be executed; and that a *Receiver of the rents, tithes and rent-charges belonging to the Vicarage, might be appointed*.

A motion was now made for the Receiver and injunction as prayed for by the bill.—In the course of the

argument the first section of 13th Eliz. c. 20, and the 13th section of 1 & 2 Vict. c. 110, were referred to. The first section of the 13th Eliz. c. 20, is as follows: "That the livings appointed for ecclesiastical ministers may not, by corrupt and indirect dealings, be transferred to other uses; be it enacted, by the authority of this present Parliament, that no lease, after the 15th day of May next following the beginning of this Parliament, to be made of any benefice or ecclesiastical promotion with cure, or any part thereof, and not being impropriated, shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice, without absence above fourscore days in any one year, but that every such lease, so soon as it or any part thereof shall come to any possession or use above forbidden, or immediately upon such absence, shall cease and be void, and the incumbent so offending shall, for the same, lose one year's profit of the said benefice, to be distributed, by the Ordinary, among the poor of the parish; and that all chargings of such benefices with cure, hereafter, with any pension or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this Act, shall be utterly void."

1850.
HAWKINS
v.
GATHERCOLE.

The 13th section of 1 & 2 Vict. c. 110, is as follows: "And be it enacted that a judgment already entered up or to be hereafter entered up against any person in any of her Majesty's superior Courts at *Westminster*, shall operate as a charge upon all lands, tenements, rectories, advowsons, *tithes*, rents and hereditaments (including lands and hereditaments of copyhold or customary tenure) of or to which such person shall, at the time of entering up such judgment, or at any time

1850.

HAWKINS

v.

GATHERCOLE.

afterwards, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents and hereditaments; and that every judgment-creditor shall have such and the same remedies, in a Court of equity, against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to *in case the person against whom such judgment shall have been so entered up, had power to charge the same hereditaments*, and had, by writing under his hand, agreed to charge the same with the amount of such judgment-debt and interest thereon: Provided, that no judgment-creditor shall be entitled to proceed, in equity, to obtain the benefit of such charge, until after the expiration of one year from the time of entering up such judgment, or, in cases of judgments already entered up, or to be entered up before the time appointed for the commencement of this Act, until after the expiration of one year from the time appointed for the commencement of this Act; nor shall such charge operate to give the judgment-creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least

before the bankruptcy: Provided also, that, as regards purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this Act, such judgment shall not affect lands, tenements, or hereditaments, otherwise than as the same would have been affected by such judgment if this Act had not passed: Provided, also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of Courts of equity whereby protection is given to purchasers for valuable consideration without notice."

1850.
 HAWKINS
 v.
 GATHERCOLE.

Mr. *Bethell*, Mr. *Badeley* and Mr. *Sidney Smith*, in support of the motion, said that the warrant of attorney did not purport, on the face of it, to have been executed, by *Gathercole*, for the purpose of creating a charge upon his living; and, therefore, it did not come within the purview of the 13 Eliz. c. 20, but was perfectly valid: that it was given to secure a debt; and the profits of ecclesiastical benefices were, at all times, liable to be sequestered on behalf of the creditors of the incumbents, and applied in satisfaction of their debts: that the 13th section of 1 & 2 Vict. c. 110, made the judgment a charge, in equity, on the Defendant's living; for that section contained the words: "rectories and tithes;" and, therefore, it was manifest that the Legislature intended to place judgments against ecclesiastical persons, on the same footing as judgments against laymen, and to make them charges on ecclesiastical as well as on lay property; and, that being so, the Plaintiff was entitled to have a receiver of the profits of the Defendant's vicarage appointed, in order that the charge might be made available to the payment of his judgment-debt.

The following authorities were cited by the Counsel in

1850.
 {
 HAWKINS
 v.
 GATHERCOLE.

support of the motion; *Mouys v. Leake* (a), *Flight v. Salter* (b), *Kirlew v. Butts* (c), *Faircloth v. Gurney* (d), *Colebrook v. Layton* (e), *Moore v. Ramsden* (f), *Saltmarshe v. Hewett* (g), *White v. The Bishop of Peterborough* (h), *Bendry v. Price* (i), *Britten v. Wait* (k), *Gibbons v. Hooper* (l), *Aberdeen v. Newland* (m), *Errington v. Howard* (n), *Cuddington v. Withy* (o), *Metcalfe v. The Archbishop of York* (p), *Tong v. Robinson* (q), *Sloane v. Packman* (r), *King v. King* (s), *Burrowes v. Molloy* (t), *Whitworth v. Gaugain* (u); Rogers's Eccles. Law, title Incumbent; and Seton on Decrees, 328.

Mr. *Speed* appeared for the Bishop of *Ely*.

Mr. *Malins*, Mr. *Smythies*, Mr. *W. T. S. Daniel*, Mr. *Roxburgh*, Mr. *Amphlett*, and Mr. *Sheffield* appeared for the other Defendants. They said that they did not dispute the validity of the warrant of attorney; and that the only question was whether the 13th sect. of 1 & 2 Vict. c. 110, had (as the Plaintiff's Counsel had, in effect, contended,) repealed, by implication, the Act of Elizabeth: that it was true that the 13th sect. of 1 & 2 Vict. did contain the words: "rectories and tithes;"

- | | |
|--------------------------|---------------------------|
| (a) 8 T. R. 411. | (k) 3 Barn. & Adol. 915. |
| (b) 1 Barn. & Adol. 673. | (l) 2 Barn. & Adol. 734. |
| (c) 2 Barn. & Adol. 736, | (m) 4 Sim. 281. |
| note. | (n) Amb. 485. |
| (d) 2 Moo. & Scott, 822; | (o) 2 Swans. 174. |
| and 9 Bing. 622. | (p) 1 Myl. & Cr. 547. |
| (e) 4 Barn. & Adol. 578. | (q) 1 Bro. P. C. 114. |
| (f) 3 Barn. & Adol. 917. | (r) 11 Mees. & Wels. 770. |
| (g) 3 Nev. & Mann. 656; | (s) 3 P. W. 358. |
| and 1 Adol. & Ell. 812. | (t) 2 Jones & Lat. 521. |
| (h) 3 Swans. 109. | (u) 1 Phill. 728. |
| (i) 7 Dowl. 753. | |

but rectories and tithes were frequently held by laymen ; and it did not contain the words, "benefices with cure of souls;" and, therefore, there was no ground for saying that it repealed, by implication, the Act of Elizabeth : moreover, that a subsequent sect. of the Act of Vict. (the 55th), provided that, where a beneficed clergyman was an insolvent debtor, nothing in the Act should cause his benefice to vest in his assignee ; and that the general affirmative words of an Act of Parliament could not repeal, by implication, another Act directly prohibiting a particular Act, or making a particular Act, void : besides, that the 13th sect. of the Act of Vict. enacted, that a judgment-creditor should have such and the same remedies, in a Court of equity, against the hereditaments charged by virtue of the Act, as he would be entitled to, *in case the person against whom the judgment had been entered up, had power to charge the same hereditaments*, and had, by writing under his hand, agreed to charge the same with the amount of the judgment-debt : but, by the Act of Elizabeth, a clergyman had no power to charge his benefice ; and, therefore, it was quite clear that a judgment against him, was not made a charge on his benefice : that the cases in which the Court had granted a receiver of a benefice with cure of souls, were decided between the years 1803 and 1817, when the Act of Elizabeth was not in force : *Shaw v. Pritchard* (x), *Alchin v. Hopkins* (y), *Cottle v. Warrington* (z) : that, unless the Plaintiff's judgment was a charge on the benefice, he had no right to apply for a receiver, and, even if it was a charge, he had no such right ; for his judgment was prior to the judgments of all the other judgment-

1850.
HAWKINS
v.
GATHERCOLE.

(x) 10 Barn. & Cress. 241. 4 Moo. & Scott, 615.

(y) 1 Bing. N. C. 99 ; and (z) 5 Barn. & Adol. 447.

1850.

HAWKINS

v.

GATHERCOLE.

creditors, and he, by means of his sequestration, was in possession of the profits of the benefice.

The other cases cited were *Kay v. Marshall* (a), *Cuddington v. Withy*, *Barnsley Canal Company v. Twibell* (b), *Arbuckle v. Cowtan* (c), *Flarty v. Odium* (d).

Mr. *Bethell*, in his reply, said that the Act of 1 & 2 Vict. was made, as appeared by its title, for extending the remedies of creditors against the property of debtors; and that the 13th section of it gave the judgment creditor of a beneficed clergyman, the same remedies, in equity, against his debtor's benefice, as he would have had if the debtor had had power to charge his benefice, and had, by writing under his hand, agreed to charge the same with the amount of the judgment-debt.

The VICE-CHANCELLOR :

This matter lies within a very narrow compass, and appears to me to be pretty well free from any doubt at all. In the outset of the argument, I did not exactly understand the facts, which are somewhat complicated; nor did I precisely see the point that was to be made. I believe that neither the Counsel nor the Court, distinctly understood what, on the one hand, was about to be relied on, or what the resistance was to be on the other; because I am sure that I am not wrong when I say that nine-tenths of the argument which has been addressed to the Court, has consisted of an elaborate canvassing of a variety of cases which, running very fine and close to each other, have raised this question: how

(a) 1 Myl. & Cr. 373.

(b) 7 Beav. 19.

(c) 3 Bos. & Pull. 321.

(d) 3 T. R. 681.

far warrants of attorney that were given by beneficed clergymen, and which were to be carried into execution by sequestrations, under which the profits of the livings were to be taken, did or did not come within the purview of the 13th Elizabeth, which prevented the charging of livings.

1850.
HAWKINS
v.
GATHERCOLE.

Now, in this case, the facts are these: Mr. *Gathercole* being, in the month of August 1845, the owner of the advowson of *Chatteris*, and being a clergyman, and, as it would seem, about to present himself to the living, mortgaged the advowson, to the Plaintiff, for the sum of 24,500*l*. He, very shortly afterwards, presented himself to the living. It does not distinctly appear whether the mortgage, in terms, included the profits of the living or not; but if it did, it is a matter of no importance, because he had not the profits to give, and, therefore, it was merely a mortgage of the advowson. And, by way of further security for the payment of the debt, he did that which I think, upon all the authorities, it was perfectly competent for him to do without bringing himself within the purview of the statute of Elizabeth. He gave a warrant of attorney to confess a judgment for the same amount: upon which warrant of attorney judgment was duly entered up, I think, in the month of September 1845. That judgment was registered, and the registration has been renewed, in order to keep the judgment alive. What right then did the judgment-creditor acquire by that? In point of fact, what he has done is this. The interest being greatly in arrear, and the judgment having been so entered up, he has issued a writ of sequestration for 200*l*., the amount of the arrears of interest. Whether, under that sequestration, he could take more than the interest; whether, under the circumstances that have happened, the judg-

1850.

HAWKINS

v.

GATHERCOLE.

ment would have warranted the sequestration for the principal as well as the interest, is a matter that I have not now to deal with at all. That is a question that might arise between Mr. *Hawkins*, the present Plaintiff, and the subsequent incumbrancers, in a Court of law. What Mr. *Hawkins* says is this: "Independent of my sequestration, I have, really and as the foundation of the sequestration, obtained a valid judgment against my debtor, Mr. *Gathercole*: what is the effect of that judgment?" That he says is pointed out, perfectly clearly, by the 13th section of the 1 & 2 Vict. c. 110; which enacts that judgments to be hereafter entered up against any person in any of her Majesty's superior Courts at *Westminster*, shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall, at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled, for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall, at the time of entering up such judgment or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment; and shall also be binding, as against the issue of his body and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments; and that every judgment-creditor shall have such and the same remedies, in a Court of equity,

against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up, had power to charge the same, and had, by writing under his hand, agreed to charge the same with the amount of such judgment-debt and interest thereon. Now what the plaintiff says is:—"The effect, therefore, of my judgment, was this; that I had, as against the profits of this living, the same right as I should have had if Mr. *Gathercole* had had power to charge the living, and had actually charged it; and, having that right, I seek to make it available in the only way in which it can be made available, namely, by getting what, perhaps, is properly enough called an equitable execution, that is, by getting a receiver appointed in order that my charge on that living may, by means of the receiver, be made available." I presume there would be no question as to the right to file such a bill and to have such relief, if, instead of a living, we were dealing with ordinary property. That will not be disputed. But, here, the point, and the sole point to which the matter, at last, is reduced is this. Prior to this statute, it is said, it was made unlawful, by the statute of Elizabeth, (which was repealed for a certain time, and then revived by the 57 Geo. III. c. 99,) for the owner of a living to charge it; and that it could not have been within the contemplation of this statute to authorize a party who was incompetent, before the statute passed, to charge his living, to charge that which, previously he was incompetent to charge; because, it was said, it was quite out of the scope of the statute. I entirely accede to that argument, if the meaning of it is that it did not authorize him to charge it in the ordinary sense of creating a charge by deed or contract; but I do not accede to it, at all, if it is meant to be contended that he can-

1850.
 HAWKINS
 v.
 GATHERCOLE.

1850.

HAWKINS

v.

GATHERCOLE.

not charge it, or rather, that the law will not charge it for him, when that is done which the law says shall give, to the party, the effect of a charge. What right have I to speculate on what the Legislature meant, when it is as clear as words can make it? But if I did speculate, I should not, in the least, doubt (whether this particular case was within the contemplation of the Legislature I know not,) that the object was to make all property that, by any process of execution could be made available to satisfy creditors, available to them by creating a charge upon it, the benefit of which they were to obtain in the ordinary way in which property charged can be made available. That is the short point, and, that being so, I have not a word more to say than that I think the Plaintiff is entitled to a receiver.

Order that it be referred, to the *Master*, to appoint some proper person to receive, collect and get in the corn-rents, rents in lieu of tithes, and all other rents, of what kind soever, offerings, fruits, oblations, obventions, pensions, and all other the commodities and emoluments, hereditaments and premises belonging or appertaining to the vicarage of *Chatteris Nuns*, in the county of *Cambridge* in the pleadings mentioned; and to allow him a proper salary for his care and pains therein: such person so to be appointed receiver, first giving security, &c., &c.; and the persons respectively liable to make payments in respect of the matters aforesaid, are to make such payments to such receiver: And it is ordered that the receiver do provide for the service of the church of the said parish, and make and pay a proper allowance and remuneration to the persons serving the same; and the said receiver is to be allowed what he shall so pay in passing his accounts before the said *Master*: And it is ordered that such receiver do, from time to time,

pass his accounts before the said *Master*, and pay the balances which shall be reported due from him (after paying such allowance and remuneration for the service of the said church as aforesaid) into the bank with the privity of the Accountant-General, &c., &c.: And it is ordered that an injunction be awarded to restrain the Defendant, the Bishop of *Ely*, from executing the several writs of *sequestrari facias* in the pleadings mentioned and issued, against the vicarage and parish church aforesaid, by the said Defendants (the Defendants whose judgments were subsequent to the Plaintiff's): And it is ordered that an injunction be awarded to restrain those Defendants from procuring to be executed, or otherwise proceeding with the writs of *sequestrari facias* issued on their several judgments in the pleadings mentioned; and from further prosecuting, or from taking or permitting to be taken any proceeding upon the said judgments against the said vicarage and parish church, and from receiving the rents, tithes, and rent-charges of the said vicarage, or any part thereof, until the hearing of this Cause, or the further order of this Court.

1850.
 {
 HAWKINS
 v.
 GATHERCOLE.

1850 :
20th and 23rd
of November
and 2nd
December.

*Voluntary deed.
Debtor and
creditor.*

A. conveyed all his property to three of his creditors, in trust to pay the debts due, from him, to themselves and to his other creditors who should execute the deed.—The trustees and some of the other creditors, executed the deed, but with notice that B. had a demand upon A. and was about to enforce it.—Afterwards B. filed a bill, against A. and the trustees, to set aside the deed, on the ground that it was a mere voluntary deed of agency.—The Court, at the hearing, dismissed the bill, with costs.

MACKINNON v. STEWART.

BY an indenture dated the 20th of November 1846, and made between the Defendant *Stewart*, of the first part, the other Defendants *Cripps*, *Burgess* and *Hannah*, three of *Stewart's* creditors of the second part, and the several other persons who signed and sealed the indenture, being also his creditors, of the third part, after reciting that *Stewart* then carried on the business of an hotel-keeper, and had become indebted, to various persons, in considerable sums of money which he was unable fully to satisfy, and had, therefore, with the consent of the parties thereto of the second and third parts, determined and agreed to execute the release and assignment, and enter into the covenants therein-after contained: he, in consideration of the premises, conveyed and assigned all his real and personal property, to *Cripps*, *Burgess* and *Hannah*, in trust to convert the same into money, and, out of the proceeds, to pay, rateably and proportionably, to the parties of the second and third parts, the sums set opposite to their respective names in the schedule thereto; and, after full payment thereof, to pay the residue to *Stewart*. That deed was executed by the trustees and thirty-four of *Stewart's* other creditors. The trustees, and nearly all the other executing creditors, executed it in June 1847 and before the 28th of that month, but not until after the Plaintiff had given the trustees notice of a claim which she had on *Stewart*,*

* The notice was given in May 1847; and the evidence for the trustees proved that they executed the indenture on or shortly after the 20th of November 1846, the day of its

1850.

MACKINNON
v.
STEWART.

as the executor of a will under which she was interested in a legacy, and of her intention to enforce it: and, on the 28th of June 1847, she filed a bill against *Stewart*, for the legacy. The Cause was heard, for further directions, on the 11th of May 1848; and, by the order then made, the amount of the legacy was ordered to be paid into Court, by *Stewart*, on or before the 4th of July following, and to be invested, and the dividends to be paid to the Plaintiff for life; and *Stewart* was directed to pay the Plaintiff 188*l.* for interest on the amount of the legacy, and also her costs of the suit. *Stewart* disobeyed that order. Whereupon the Plaintiff issued (but to no purpose) first, an *elegit*, then an attachment, and, lastly, on the 8th of February 1849, a sequestration against him. On the 24th of November 1848, she procured the order of the 11th of May 1848 to be registered pursuant to the 1 & 2 Vict. c. 110, s. 19; and, on the 1st of March 1849, she filed the bill in this Cause, stating that the indenture of the 20th of November 1846, *was a mere voluntary deed of agency*, and that no estate, right or interest was thereby vested in the trustees, which ought to prevent the execution of the *elegit* and sequestration: that, on the 11th of May 1848, her solicitor served the trustees with notice of the order of that date: that only a very few of *Stewart's* creditors had executed the indenture, and that they executed it long after *Stewart* had done so, and

date; and they stated so, in the body of their answer. But the schedule to their answer was so prepared, as to make it appear that they executed the indenture at the same time as the other creditors, which was in June 1847, and, consequently, after the notice was served. The *Vice-Chancellor*, however, considered it to be immaterial whether the trustees executed the indenture with or without notice of the Plaintiff's claim on *Stewart*.

1850.

MACKINNON
v.

STEWART.

only a short time before the institution of this suit: that it was not executed by virtue of any bargain between *Stewart* and his creditors, or for any consideration moving from them to him; and that *it was revocable, by him*, at any time: that he had no property on which the *elegit* or the sequestration could be executed, except what was vested in the trustees under the indenture: and that, on the expiration of a year from the 24th of November 1848, the Plaintiff would be entitled to a charge, upon all *Stewart's* freehold estates, for the sums directed to be paid to her by the order of May 1848. The bill prayed for a declaration that the indenture was a mere voluntary deed of agency; and that the trustees might be restrained from setting up or availing themselves of any estate or interest under it, so as to defeat the *elegit* and sequestration; and also from executing the trusts of the indenture: that a receiver might be appointed of the trust property; and for a declaration that, on the expiration of one year from the 24th of November 1848, the Plaintiff would be entitled to an equitable charge, on *Stewart's* freehold estates, for the sums which he had been ordered to pay to her; and that the trustees might be directed to deliver all *Stewart's* personal property in their possession, to the Plaintiff, or to the sheriff to whom the *elegit* was directed.

Stewart, in his answer, admitted the facts stated in the bill, and submitted that the indenture was a mere voluntary deed of agency; and added that he executed it on the express understanding and agreement, with the trustees, that the Plaintiff should be paid, in full, before any dividend was paid to his other creditors.

The trustees, in their answer, admitted that no consideration was given for the indenture, save as therein

might appear; but they submitted whether it was a voluntary deed of agency, or whether it was revocable, by *Stewart*, or not. They added that they executed it about the time of its date; and that the greater part, if not all, the other creditors who had executed it, did so in 1847: that they believed it was not executed by virtue of any bargain between *Stewart* and his creditors, except only that it was understood and agreed, between him and his creditors executing the indenture, that he was not to be made a bankrupt or otherwise molested by them in respect of their debts; and that there was no property on which the Plaintiff's *elegit* and sequestration could be executed, except what was vested in the Defendants under the indenture. It also appeared, from the answer and one of the schedules to it, that the trustees had paid dividends to the creditors who had executed the indenture.

1850.
 }
 MACKINNON
 v.
 STEWART.

The Cause now came on to be heard.

Mr. *Stuart* and Mr. *Terrell*, for the Plaintiff, said, first, that none of the creditors, not even the trustees, executed the indenture of November 1846, until after they had notice of the Plaintiff's claim upon *Stewart*, and of her intention to enforce it; and that *Stewart* swore, in his answer, that he executed it on the express understanding and agreement, with the trustees, that the Plaintiff should be paid in full, before any dividend was paid to his other creditors: secondly, that the deed was a mere voluntary deed of agency; that it was not founded on any contract between *Stewart* and his creditors; that it contained no covenant, on their part, not to sue him for their debts; nor was there any other consideration for it: consequently the property comprised in it, was precisely in the same position as it

1850.

MACKINNON
v.
STEWART.

would have been in, if it had remained in *Stewart's* possession: *Garrard v. Lord Lauderdale* (a), *Wahoyne v. Coutts* (b), *Acton v. Woodgate* (c), *Bill v. Cureton* (d), *Wilding v. Richards* (e), *Gibbs v. Glamis* (f).

Mr. *Bethell* and Mr. *Nevinson*, for *Stewart*, contended that the indenture was fraudulent and void, *as against the Plaintiff*; but they did not ask that it might be set aside as between *Stewart* and his other creditors. They added that *Stewart*, as appeared from his answer, executed the indenture on the faith of an agreement, between him and the trustees, that the Plaintiff should be paid first.

Mr. *Rolt* and Mr. *Amphlett*, for the trustees.

If a debtor conveys property, to trustees, in trust to pay his debts, and the deed is communicated to the creditors, and they act or even rely upon it, they become *cestuis que trust* under it (g). Here the creditors have not only executed the deed, but received dividends under it. [Mr. *Stuart*.—Our case is that the trustees and creditors at large, executed the deed after they had notice of the Plaintiff's claim.] It appears, from our evidence, that the trustees executed the deed on the day of its date, and that the other creditors executed it before the bill was filed for the legacy. Besides, it was nothing more than notice, from one creditor to another that the former was taking steps to recover her debt. Is a debtor to be restrained from executing a deed for the

(a) 3 Sim. 1; and 2 Russ.
& Myl. 451.

(b) *Ibid.* 14; and 3 Mer.
707.

(c) 2 Myl. & Keen, 492.

(d) *Ibid.* 503.

(e) 1 Collyer, 655.

(f) 11 Sim. 584.

(g) See 2 Myl. & Keen,

510.

benefit of all his creditors, merely because one of them is proceeding, or about to proceed to enforce her demand? It has been said that there was no consideration for the deed. But the trustees swear, in their answer, that it was understood and agreed, between *Stewart* and his creditors executing the deed, that he was not to be made a bankrupt or be otherwise molested, by them, in respect of their debts. It is, however, quite immaterial whether there was that agreement or not. The debts due from *Stewart*, were, alone, a sufficient consideration for the deed. The decisions in *Garrard v. Lord Lauderdale* and *Walwyn v. Coutts*, were founded not on there having been no consideration for the deeds in those cases, but on the ground that the deeds had not been communicated to the creditors. If they had been communicated, a trust would have been raised, and the debtor could not have revoked them. In this case, however, it is not the debtor who is seeking to set aside the deed, but one of his creditors; and there is no instance in which such an attempt has been made by a creditor.

1850.
MACKINNON
v.
STEWART.

The case of *Acton v. Woodgate*, is an authority in our favour; for, there, the conveyance which had been executed by the creditors, was supported.

The case of *Gibbs v. Glamis*, has no application to the present: for, there, the Plaintiff, who sought the benefit of the deed, had not executed it.

The learned Counsel then referred to *Fitzgerald v. Stewart* (*h*), *Browne v. Cavendish* (*i*), and *Simmonds*

(*h*) 2 Russ. & Myl. 457.

(*i*) 1 Jones & Lat. 606, see 635 and 636.

1850.
 {
 MACKINNON
 v.
 STEWART.

v. *Palles* (k), and, particularly, to the observations made by Sir *E. Sugden*, C., in the last two cases, upon *Garrard v. Lord Lauderdale* and *Gibbs v. Glamis*.

Mr. *Stuart* replied.

(k) 2 Jones & Lat. 489. See 504, *et seq.* The following are the observations referred to in the text. In *Browne v. Cavendish*, Sir *E. Sugden* said :

“ *Wallwyn v. Coutts* and *Garrard v. Lord Lauderdale* are, certainly, authorities for my decision. In speaking of *Garrard v. Lord Lauderdale*, I observe that the *Master of the Rolls*, in *Acton v. Woodgate*, says : ‘ That it seems to have been considered, in that case, that a communication, by the trustees, to creditors, of the fact of such a trust, would not defeat the power of revocation by the debtors.’ It appears to me, however, that this doctrine is questionable ; because the creditors, being aware of such a trust, might be, thereby, induced to a forbearance in respect of their claims, which they would not otherwise have exercised. When I first read that case, I made this observation in the margin ; ‘ This has always been my opinion ;’ but, in stating this, I do not mean to bind myself to hold that, in every case, a representation to a creditor will give him the benefit of the trust. It must depend on the character of the representation and the manner it is acted on. On the other hand, I should be sorry to have it understood that a man may create a trust for the benefit of his creditors, communicate it to them, and obtain, from them, the benefit of their lying by until, perhaps, the legal right to sue was lost, and then insist that the trust was wholly within his own power. The case of *Gibbs v. Glamis*, which has been much relied upon at the Bar, is also an authority of considerable weight in favour of my decree. There, several persons were entitled to a fund in a Cause ; some of them being liable to the costs of a third party, they all assigned the fund, to trustees, to pay the costs of that third party ; then in trust for themselves : and it was held that the person whose costs were so provided for, had no right to enforce the trust, he not

The VICE-CHANCELLOR :

This was a bill filed, by Mrs. *Mackinnon*, against *James Stewart* and three persons named *William Cripps*

1850.
MACKINNON
v.
STEWART.
2nd December.

being a party to the deed : though it was a case in which an actual trust was created for the benefit of the third party, and money was received, by the trustees, and was in their hands to answer the trust : and some of the assignors had an interest, as against the others, to have the trust carried into execution. The *Vice-Chancellor* thought the creditors had the right ; but the *Chancellor* reversed his decision (a). Here the parties have defeated their own trust ; but, in *Gibbs v. Glamis* the trust never was defeated. It was an existing trust ; and yet it was ultimately held that the creditor could not enforce it."

In *Simmonds v. Palles*, Sir *E. Sugden* said :—" The cases which were understood to apply to the present, were *Garrard v. Lord Lauderdale*, and others of that class. Those cases have, certainly, gone a great length ; and I am not disposed to carry the principle further than authority compels me : but they establish this ; that, if parties make arrangements between themselves, behind the back of a third person, even though they should declare a trust for the benefit of that third person by name, if that be not in the nature of a settlement, though voluntary, but is merely an arrangement for the benefit of the parties themselves who enter into it, the third person cannot, upon that naked state of circumstances, file a bill to establish his demand as a *cestui que trust*. *Garrard v. Lord Lauderdale* went far enough : for, there, the creditor was, in point of form, a party to the deed, and the deed was communicated to him ; yet it was held that that circumstance did not enable him to file a bill to enforce the trust. * * * In the last case upon the subject, (*Gibbs v. Glamis*,) which has not been cited, but to which I have had occasion, lately, to refer, the *Vice-Chancellor* held one way, and the *Chancellor* another. It was of this nature. Several persons were interested in a fund, in respect of which a suit had been instituted : they made an arrangement of their claims between themselves, and

(a) See 11 Sim. 591.

1850.
 MACKINNON
 v.
 STEWART.

Edward William Burgess and Joseph Hannah, to whom Stewart had conveyed all his property in trust for pay-

assigned the fund to trustees; and one of the trusts was, expressly, to pay to a Defendant in the suit, who was not a party to the arrangement, his costs to which one of the parties to the deed was liable. The fund was realized and actually in the hands of the trustees; and, they not having paid the costs, a bill was filed, by the third party, to have the trusts carried into execution, and his costs paid. The *Vice-Chancellor* was of opinion that these circumstances distinguished the case from *Garrard v. Lord Lauderdale*, and took this distinction; that it was not the case of a person voluntarily making a provision for payment of his creditors, but of several persons, some of whom were liable to the demand, agreeing, amongst themselves, that a particular fund in which they were all interested, should be the fund for the payment of it. Lord *Cottenham* reversed that decree, and said that it was competent for any of the Defendants to make the objection, and that it was immaterial what interest the party making the objection, had: and he held, even in that case upon which I should have had considerable doubt, that the Plaintiff could not maintain his bill. * * * I never was quite reconciled to the authorities. I submit to them, as I am bound to do; but I will not carry them further. *Garrard v. Lord Lauderdale* followed the principle laid down by Lord *Eldon*, as to which there was no doubt: whether the facts of that case warrant the decree, is another question; and men's minds may differ on it. But, as to the principle, no person will dispute it. It was settled, before that case, that, if a man, without communication with his creditors, make a provision for paying them for which they have not bargained, he may, before the execution of the trusts, destroy them. The questions in that case, were whether, under the circumstances, the Duke of *York* had exercised that power; and whether it was competent for him to do so. Without going through the cases, I will refer to *Gibbs v. Glamis*, a remarkable case, one upon which learned persons differed: for the decree of the *Vice-Chancellor* was reversed by the *Chancellor*; and I am not satisfied that some learned persons would not prefer the first decision. That

ment of such of his creditors as should execute that deed.

1850.
MACKINNON
v.
STEWART.

case was of this nature. A Mr. *Hele* claiming to be interested in a sum of 4000*l.*, filed a bill in respect of it. *Gibbs*, the Plaintiff, was, I suppose, properly a Defendant in that suit. There was a contest as to who was entitled to the 4000*l.*; and the several claimants came to an agreement, between themselves, that they would divide the money amongst them in certain proportions; and that all the costs of the suit should be provided for; and, in particular, *Gibbs's* costs: and, without any communication with him, they assigned the 4000*l.* to trustees in trust, first, to pay the costs and expenses, of all parties to the deed, in or about the suit of *Hele v. Fernie*, or of the deed or otherwise relating to their claims on the 4000*l.*, as between solicitor and client; and also the costs of *Gibbs*, and other costs; and then to pay 800*l.* to *Hibbert*, 1800*l.* to *Hele*, and the residue to Lady *Glamis*. So that Lady *Glamis* had no right to receive anything until after payment of the costs to *Gibbs*. There was an express trust to pay *Gibbs* his costs, as to pay Lady *Glamis* the residue. The trustees received the money, and paid the other persons named in the deed; and were willing to pay *Gibbs*, when Lady *Glamis* objected that he was not entitled to be paid out of that fund. The *Vice-Chancellor* held that the several parties to the deed, had a common interest in the payment of *Gibbs's* costs out of the fund; that the agreement had only been entered into on the condition that payment of *Gibbs's* costs would be provided for out of the fund; and, therefore, that the case was not within the authorities; and he sustained the bill: but the *Chancellor* reversed the decree; and that reversal appears to have been submitted to. He said, in his judgment, that *Hele* was liable to pay the Plaintiff, *Gibbs*, his costs; and, in order to protect him against the consequences of that liability, the parties provided, incidentally, that the Plaintiff's costs should be paid out of the fund: that the question then was whether that provision gave the party whose costs were to be so provided for, a right to institute a suit as a *cestui que trust*, he having no interest in the fund; not having been a party to the arrangement; and the agreement having been made, between the parties inter-

1850.
 MACKINNON
 v.
 STEWART.

Edward William Burgess and Joseph Hannah, to whom *Stewart* had conveyed all his property in trust for pay-

assigned the fund to trustees; and one of the trusts was, expressly, to pay to a Defendant in the suit, who was not a party to the arrangement, his costs to which one of the parties to the deed was liable. The fund was realized and actually in the hands of the trustees; and, they not having paid the costs, a bill was filed, by the third party, to have the trusts carried into execution, and his costs paid. The *Vice-Chancellor* was of opinion that these circumstances distinguished the case from *Garrard v. Lord Lauderdale*, and took this distinction; that it was not the case of a person voluntarily making a provision for payment of his creditors, but of several persons, some of whom were liable to the demand, agreeing, amongst themselves, that a particular fund in which they were all interested, should be the fund for the payment of it. Lord *Cottenham* reversed that decree, and said that it was competent for any of the Defendants to make the objection, and that it was immaterial what interest the party making the objection, had: and he held, even in that case upon which I should have had considerable doubt, that the Plaintiff could not maintain his bill. * * * I never was quite reconciled to the authorities. I submit to them, as I am bound to do; but I will not carry them further. *Garrard v. Lord Lauderdale* followed the principle laid down by Lord *Eldon*, as to which there was no doubt: whether the facts of that case warrant the decree, is another question; and men's minds may differ on it. But, as to the principle, no person will dispute it. It was settled, before that case, that, if a man, without communication with his creditors, make a provision for paying them for which they have not bargained, he may, before the execution of the trusts, destroy them. The questions in that case, were whether, under the circumstances, the Duke of *York* had exercised that power; and whether it was competent for him to do so. Without going through the cases, I will refer to *Gibbs v. Glamis*, a remarkable case, one upon which learned persons differed: for the decree of the *Vice-Chancellor* was reversed by the *Chancellor*; and I am not satisfied that some learned persons would not prefer the first decision. That

ment of such of his creditors as should execute that deed.

1850.
 MACKINNON
 v.
 STEWART.

case was of this nature. A Mr. *Hele* claiming to be interested in a sum of 4000*l.*, filed a bill in respect of it. *Gibbs*, the Plaintiff, was, I suppose, properly a Defendant in that suit. There was a contest as to who was entitled to the 4000*l.*; and the several claimants came to an agreement, between themselves, that they would divide the money amongst them in certain proportions; and that all the costs of the suit should be provided for; and, in particular, *Gibbs's* costs: and, without any communication with him, they assigned the 4000*l.* to trustees in trust, first, to pay the costs and expenses, of all parties to the deed, in or about the suit of *Hele v. Fernie*, or of the deed or otherwise relating to their claims on the 4000*l.*, as between solicitor and client; and also the costs of *Gibbs*, and other costs; and then to pay 800*l.* to *Hibbert*, 1800*l.* to *Hele*, and the residue to Lady *Glamis*. So that Lady *Glamis* had no right to receive anything until after payment of the costs to *Gibbs*. There was an express trust to pay *Gibbs* his costs, as to pay Lady *Glamis* the residue. The trustees received the money, and paid the other persons named in the deed; and were willing to pay *Gibbs*, when Lady *Glamis* objected that he was not entitled to be paid out of that fund. The *Vice-Chancellor* held that the several parties to the deed, had a common interest in the payment of *Gibbs's* costs out of the fund; that the agreement had only been entered into on the condition that payment of *Gibbs's* costs would be provided for out of the fund; and, therefore, that the case was not within the authorities; and he sustained the bill: but the *Chancellor* reversed the decree; and that reversal appears to have been submitted to. He said, in his judgment, that *Hele* was liable to pay the Plaintiff, *Gibbs*, his costs; and, in order to protect him against the consequences of that liability, the parties provided, incidentally, that the Plaintiff's costs should be paid out of the fund: that the question then was whether that provision gave the party whose costs were to be so provided for, a right to institute a suit as a *cestui que trust*, he having no interest in the fund; not having been a party to the arrangement; and the agreement having been made, between the parties inter-

1850.
 MACKINNON
 v.
 STEWART.

Mrs. *Mackinnon* filed this bill in the character of a creditor of *Stewart* under a decretal order of this Court made, on the 11th of May 1848, in another Cause in which she was Plaintiff and *Stewart* was sole Defendant: and by which decretal order, *Stewart* had been ordered to pay several sums of money to her, and also to bring a further sum of money into Court, to be secured and invested for her benefit during her life. *Stewart* not having made any of the payments according to the order, Mrs. *Mackinnon* obtained a writ of *elegit* directed to the Sheriff of *Middlesex*, and also a writ of sequestration against *Stewart*. But neither of those writs produced any beneficial result to her.

ested in the fund, for their own benefit or convenience; and that the case was not distinguishable from *Garrard v. Lord Lauderdale* and the other cases which had been cited: and he added that the objection was one which was open to all the Defendants; and that it was immaterial what interest the party who made the objection, had. That is a much stronger case than the one before me; for, there, several parties agreed to vest a common fund in trustees, upon trust to pay, to a person named, an obligation that person held against one of them. The difficulty was that Lady *Glamis* never could have recovered the residue until after payment of the costs to *Gibbs*. That case, therefore, proves this: that, in order to give, to a person standing in the position of *Gibbs*, or *Simmonds* in the present case, a right to file a bill, it is not sufficient to have a trust declared for his benefit, and to show that the trust must be executed. He cannot assert his remedy in this Court: he must wait until the person liable to him, calls for an execution of the trust. Mr. *Hele* might have filed a bill to have the trusts executed, and have insisted on the trustees paying those costs to *Gibbs*, or to him for *Gibbs*, before the residue was paid over to Lady *Glamis*; and, if the trustees paid Lady *Glamis* without paying *Gibbs's* costs, they would be answerable to *Hele* for a breach of trust."

In this state of circumstances, she, on the 1st of March 1849, instituted the present suit, alleging that, on the 20th of November 1846, *Stewart*, by a deed of that date, made between himself of the first part, the three other Defendants of the second part, and the several other persons, creditors of *Stewart*, who should execute the deed of the third part, conveyed all his estate, real and personal, to the three other Defendants, upon trust to sell, and to apply the money thereby produced, in payment of the debts of the parties thereto of the second and third parts, rateably, according to the amount of their debts.

1850.
 }
 MACKINNON
 v.
 STEWART.

The bill then states that the deed was executed by only a few of the creditors of *Stewart*, and only a short time before the institution of the present suit, without consideration, and not by virtue of any bargain with *Stewart*, their debtor. The bill also states that, on the 24th of November 1848, the Plaintiff caused the decretal order of the 11th of May preceding, to be duly registered, in the Court of Common Pleas, pursuant to the 1 & 2 Vict. c. 110, s. 19, so as to make it a charge on the real estate of *Stewart*. The prayer of the bill is that the deed of the 20th November 1846, may be declared to be a mere voluntary deed of agency; and that the trustees may be restrained from setting it up against the Plaintiff's writs of *eligit* and sequestration, and from disposing of any part of the property still remaining vested in them, or otherwise executing any of the powers conferred on them by the deed; and that it may be declared that, on the expiration of a year from the 24th of November, the Plaintiff will be entitled to an equitable charge for the sums decreed to be paid by *Stewart*, with consequential directions for making that charge available.

1850.

MACKINNON

v.

STEWART.

Stewart, by his answer, admits the plaintiff's demand against him ; and he also admits the execution of the deed of trust ; but he says it was executed on an express agreement, with the trustees, that they should, out of the money coming to their hands, in the first instance, pay the Plaintiff her demand in full, before the other creditors should receive anything. I mention this passage in *Stewart's* answer, merely in order, at once, to dispose of it, by saying it has no reference to the case made by the Plaintiff, and would give rise to an equity (if any) totally different from that asserted by the bill.

The trustees, by their answer, insist on the deed, and allege that it was executed by nearly all the creditors (above thirty in number) not only before the institution of this suit, but before the institution of the former suit in which the Plaintiff obtained the decree against *Stewart*. And this is proved to have been the case by the depositions of witnesses examined in the Cause.

The former bill against *Stewart*, was filed on the 28th of June 1847 ; and the deed is proved to have been executed by thirty-one out of thirty-four of the creditors who have signed it, on various days from the 4th to the 26th of the same month. It is true, indeed, that, early in the month of May, the Plaintiff gave notice, to the trustees, of her intention to proceed against *Stewart* ; but this is not material. Knowledge on the part of the trustees, or notice given to them that proceedings in equity were on the eve of being instituted by a party claiming to have, and who, ultimately, turned out to have an equitable demand against the debtor, can have no bearing on the question, what is the true nature of the deed.

On this which is, in truth, the only question in the Cause, I entertain no doubt whatever. This is, clearly, not a mere deed constituting the trustees the agents of the debtor, but a deed effectually creating certain trusts for the benefit of the creditors, and of which trusts they, or such of them as have executed it, have a right to insist on the performance.

1850.
MACKINNON
v.
STEWART.

The doctrine of this Court as to mere deeds of agency, is perfectly simple and intelligible. It is competent to any one to make another his agent or attorney to get in his property and apply it in payment of his debts, or in any other mode he may direct. And, after he has done so, he may, at his pleasure, revoke the authority so given, and direct any other disposition of his property which he may prefer. What was really decided in *Garrard v. Lord Lauderdale* and other cases involving the same point, was only this: that, in such a case, the conveyance of property to the agent, makes no difference as to the right of revocation in the debtor. The party in whom the property has been vested, is a mere trustee for the debtor, by whom it has been conveyed to him. He still is the mere agent or attorney, or in the nature of an agent or attorney of the debtor, and must obey his directions as to the disposal of the property.

On the other hand, it is abundantly clear, on the authorities, that, where a creditor is a party to a deed whereby his debtor conveys property to a trustee to be applied in liquidation of the debt due to that creditor, the deed is, as to the creditor, irrevocable. A valid trust is created in his favour; and the relation between the debtor and trustee, is no longer that of mere principal and agent. Of course that which is true where a single creditor is the *cestui que trust*, is at least equally

1850.

MACKINNON

v.

STEWART.

so where there are many creditors. Nor does the creditor executing the deed become less a *cestui que trust*, because he gives nothing, to the debtor, as a consideration for the trust created in his favour, or because it was the voluntary, unsolicited act of the debtor, to create the trust. I never knew that any question had been raised, on this subject, as against creditors who had executed the deed and so made themselves *cestuis que trust*.

Where they have not executed the deed, questions have often arisen, how far, by having been apprized of its execution, and so, perhaps, been induced to do, or abstain from doing something which may affect their interests, they may not have acquired the rights of *cestuis que trust*. This is the question referred to by Sir *J. Leach*, in *Acton v. Woodgate*, and by Sir *E. Sugden*, in *Broune v. Cavendish*. But where, as in the present case, the creditors have actually executed the deed, I apprehend there is no longer any possibility of treating it as a mere voluntary deed of agency, revocable by the debtor.

I have already stated that, here, the deed appears to have been executed by nearly all the creditors, before the Plaintiff instituted her former suit against *Stewart*. But it makes no difference, in my view of the case, whether the deed was executed before or after the institution of that suit, or, even, before or after the institution of this suit. Where the inquiry is whether a deed has been executed with the fraudulent intention of defeating or delaying creditors, it may be very important to know when it was executed. But such an inquiry would be wholly beside the question, whether the deed is or is not revocable as being a mere deed of agency. And the whole of the Plaintiff's supposed equity is made,

by her bill, to rest on the ground that the deed in this case, is a mere deed of agency, and not a deed creating a valid trust, capable of being enforced, by creditors, against *Stewart*. She wholly fails to establish this proposition, on which alone her case depends. There is no suggestion of any fraud, nor, indeed, of any invalidity of the deed, except as being a mere revocable instrument.

1850.
MACKINNON
v.
STEWART.

The Plaintiff, therefore, having failed to establish a title to any equitable relief whatever, her bill must be dismissed with costs.

I ought not to omit to add that, besides the relief she asks against the deed, she also prays for relief as an equitable incumbrancer under the stat. 1 & 2 Vict. c. 110, ss. 13, 18 and 19. It is sufficient, on this part of the case, to say that the statute, by s. 13, which relates to judgments at Law, expressly prohibits the institution of any proceeding in Equity, for a year after judgment has been entered up. By s. 18, decrees and orders of this Court are put on the same footing as judgments at Law; and this bill, even if it made a case for relief on this latter ground, is premature, having been filed within less than four months after the decretal order was registered pursuant to s. 19 of the statute.

1850:
5th and 9th
December.

Parent and
child.
Will.
Construction.

Testator gave all his property to trustees, in trust to pay an annuity to his wife, and, subject to that payment, to convey, assign or transfer, all his property, unto and equally between his children, when and as they severally attained twenty-one; and, in the mean time, to pay, to his wife, *or otherwise apply* the rents and proceeds of their respective shares for or towards their respective maintenance, education, and advancement. But, in case of any of the children under twenty-one, then upon trust to convey, assign or transfer the shares of such of them as should so die, *and the accumulations*, if any, unto and equally between such of them as should attain twenty-one. The testator's widow maintained and educated the children for several years, and advanced three of them, out of the income received by her from the testator's property, exclusive of her annuity; and, the income being more than sufficient for those purposes, a considerable surplus remained in her hands. Held that the surplus belonged, not to the children, but to the widow.

BROWNE v. PAULL.

HOGGINS v. PAULL.

CHARLES HARWOOD, by his will dated the 7th of July 1841, gave all his real and personal property to *Richard Knight* and *Thomas Burlton*, their heirs, executors, &c.: "Upon trust, out of the rents and proceeds of my said estate and effects, in the first place, to pay unto my wife, *Ann Harwood*, an annuity or annual sum of 300*l.*, during her life, by equal quarterly payments, the first quarterly payment thereof to be made at the expiration of three months next after my decease; and, subject to and charged with the payment of the said annuity, upon trust to convey and assign or transfer all my said freehold, leasehold and other estate and effects, unto and equally between my eight children, *Hannah, Thomas Charles, Joseph, Mary Ann, Emily Elizabeth, Adelaide Eleanor, Rachel* and *Ann Louisa*, when and as they severally attain the age of twenty-one years; and, in the mean time, to pay, unto my said wife, *or otherwise apply* the rents and proceeds of the respective shares and interests of my said children, in my said estate and effects, for or towards their respective maintenance, education, *and advancement*. But, in case

of the decease of any or either of my said children under the age of twenty-one years, then upon trust to convey, assign or transfer the share or shares of such one or more of them as shall die under that age, *and the accumulations* (if any) unto and equally between such of my said children as shall live to attain that age. Provided always, and I do hereby declare and direct that it shall be lawful for the trustees or trustee for the time being of this my will, with the consent in writing of my said wife during her life, and, after her decease, of their or his own authority, to demise or lease all or any part of my said estates, for any term or number of years, either in possession or reversion, and to take any premiums or premium, which shall be held, by my said trustees, upon the same or similar trusts as the estates and premises from which such premium or premiums shall proceed: Provided also and I do further declare and direct that it shall be lawful for the trustees or trustee for the time being of this my will, at any time or times, with the consent in writing of my said wife during her life, and, after her decease, of their or his own authority, to sell or dispose of all or any part of my said freehold, leasehold or other estate or effects, either by public sale or private contract, and to convey and assign the same, when sold, to the purchaser or purchasers thereof, and to invest the monies to arise therefrom, and stand possessed thereof, and of the dividends, interest and proceeds to arise therefrom, upon the trusts aforesaid, or as near thereto as may be." The will then provided for the appointment of new trustees, and for the indemnity of the trustees and executors; and it concluded by appointing Mrs. *Harwood* and the trustees, executrix and executors thereof: but the testator did not appoint any guardian to his children.

The testator died on the 9th of July 1841. His

1850.

BROWNE
v.
PAULL.
HOGGINS
v.
PAULL.

1850.
 BROWNE
 v.
 PAULL.
 HOGGINS
 v.
 PAULL.

widow, alone, proved his will. She afterwards married the defendant *Henry Andrew Paull*; and, *Knight and Burlton* having renounced and disclaimed, the rents of the testator's freehold and leasehold estates, were received by Mr. and Mrs. *Paull*.

The bill in *Browne v. Paull* was filed by the testator's children, all of whom were infants, and two other persons named *Browne* and *Chambers*, against Mr. and Mrs. *Paull* and *A. W. Hoggins* who had married the testator's eldest daughter.

On the 22nd of November 1844, an order was made in that Cause, on the petition of the Plaintiffs, by which Mrs. *Paull* and Mr. *Hoggins* were appointed the guardians of the seven youngest children, and certain sums were allowed for the maintenance of Mrs. *Hoggins*, and for the maintenance and education of her brothers and sisters, during their minorities; and it was ordered that those sums should be paid, half-yearly, by Mr. and Mrs. *Paull*.

Under another order made in the same Cause, in January 1845, a receiver of the rents of the hereditaments and premises in question in the Cause, was appointed; with a direction to make the payments directed, by the prior order, to be made by Mr. and Mrs. *Paull*.

The decree in the same Cause, dated in February 1845, directed, amongst other things, accounts to be taken of the testator's personal estate, possessed by Mr. and Mrs. *Paull*, and of the testator's debts, &c.; and that the *Master* should inquire and state what freehold and leasehold estates the testator was seised and possessed of at his death or had contracted to purchase, and by whom the rents and profits thereof had been

received since his death; and to take an account thereof; and to inquire and state whether the rents and profits * of the respective shares and interests of the testator's children in his estate and effects, or any and what parts thereof, had been paid to Mr. and Mrs. *Paull* or either of them, or otherwise applied for or towards their respective maintenance, education or advancement; and how all such parts, if any, of the same rents and proceeds * as had not been so paid and applied, had been paid, applied and disposed of; with liberty to state special circumstances: and the Receiver was continued and directed to continue the payments in the manner directed by the orders of November 1844 and January 1845.

1850.
BROWNE
v.
PAULL.
HOGGINS
v.
PAULL.

* *Sic.*

The suit of *Hoggins v. Paull* was instituted by Mr. *Hoggins* against the other parties to *Browne v. Paull*, and his infant child. The decree in it, dated in December 1845, directed, amongst other things, the decree in *Browne v. Paull*, and the accounts and inquiries thereby directed, to be carried on and prosecuted between the parties to *Hoggins v. Paull*, in like manner as the same were directed between the parties to *Browne v. Paull*: that the *Master* should take an account of the rents and profits of the testator's real estates come to the hands of Mr. and Mrs. *Paull*, or either of them: that he should inquire and state what were the respective shares and interests, of the testator's children, in the testator's estate and effects; and what payments had been made, out of his estate and effects and the rents, interest and proceeds thereof, for or towards their respective maintenance, education and advancement, in respect of their shares and interests, and to whom such payments had been made: that the Receiver should be continued, and should pay, to Mrs. *Hoggins*, on her separate receipt, 200*l.* per annum,

1850.
 BROWNE
 v.
 PAULL.
 HOGGINS
 v.
 PAULL.

instead of 150*l. per annum*, directed, by the order of the 22nd of November 1844, by quarterly payments, the first payment to be made on the 25th of December then instant; and such payments were to be without prejudice to any question as to the amount of her share or her rights: and liberty was given, to the *Master*, to state special circumstances relating to the matters aforesaid.

The *Master*, by his report made in both the Causes, in February 1850, found, amongst other things, that a balance of 581*l. 12s. 4d.* was due, from Mr. and Mrs. *Paull*, in respect of the testator's personal estate come to their hands; that, from the testator's death up to the 24th of March 1845, the rents and profits of the testator's freehold and leasehold estates were received by Mr. and Mrs. *Paull* or one of them, and that, since that day, they had been received by the Receiver: and that a balance of 4,652*l. 1s. 4d.* was due from Mr. and Mrs. *Paull*, in respect of the rents and profits received by them, and that Mr. and Mrs., *Paull*, had, out of the testator's estate and effects, and the rents, profits, interest, dividends, and income thereof, paid and applied for the maintenance and education of the testator's children, from the day of his death up to the 25th of March 1845, sums amounting to 2,872*l. 12s.*, and, for the advancement of Mrs. *Harwood* and two of her brothers, sums amounting to 605*l. 14s.*, and that the amount of those two sums being deducted from the amount of the balances of 4,652*l. 1s. 4d.*, and 581*l. 12s. 4d.*, there remained the sum of 1,735*l. 7s. 8d.*, which the *Master* found to be due, from Mr. and Mrs. *Paull*, on balance of all their accounts.

The Causes now came on to be heard for further directions. The question was whether the 1735*l. 7s. 8d.*

belonged to Mrs. *Paull* or to the testator's children.

Mr. *Bethell* and Mr. *Craig*, for the testator's children and the other Plaintiffs in *Browne v. Paull*, said that the testator had directed the trustees of his will to pay, to his wife, or otherwise apply the rents and proceeds of his children's shares of his property, for their maintenance, education and advancement; and that, whenever there was a direction to apply a fund to a particular purpose, it must be applied accordingly; that there being, in this case, a portion of the fund which was not required to be so applied, it fell within the denomination of accumulations, and, therefore, the children were entitled to it: but that, if the testator had given the fund, to his widow, for the maintenance, education and advancement of his children, or to enable her to maintain, educate and advance them, it would have been a gift to her, charged with the performance of a duty, and she would have been entitled to so much of the fund as should not be required for the performance of that duty: *Andrews v. Partington* (a) and *Thorp v. Owen* (b), where Vice-Chancellor *Wigram* said: "The cases should be considered under two heads: first, those in which the Court has read the will as giving an absolute interest to the legatees, and as expressing, also, the testator's motive for the gift; and, secondly, those cases in which the Court has read the will as declaring a trust upon the fund, or part of the fund in the hands of the legatee. A legacy to A., the better to enable him to pay his debts, expresses the motive for the testator's bounty; but, certainly, creates no trust which the creditors of A. could enforce in this Court: and, again, a legacy to A.,

1850.
BROWNE
v.
PAULL.
HOGGINS
v.
PAULL.

(a) 2 Cox, 223, and 3 Brown, C. C. 60.

(b) 2 Hare, 611; and see 614.

1850.

BROWNE

v.

PAULL.

HOGGINS

v.

PAULL.

the better to enable him to maintain or educate and provide for his family, must, in the abstract, be subject to a like construction: it is a legacy to the individual, with the motive only pointed out. This is very clearly, and, in my opinion, very correctly laid down by the Vice-Chancellor in the late case of *Benson v. Whittam*; and the cases of *Andrews v. Partington*, *Brown v. Casamajor*, and *Hammond v. Neame* illustrate the same principle. At the same time, a legacy, to a parent, upon trust to be by him applied, or in trust for the maintenance and education of his children, will, certainly, give the children a right, in a Court of Equity, to enforce their natural claims, against the parent, in respect of the fund on which the trust is declared. And a similar rule, as I have already observed, has prevailed in favour of adult *cestui que trusts*, notwithstanding the difficulty of measuring the amount of interest in those cases." That, in *Hadow v. Hadow* (c), there was a gift of the dividends of the son's shares, to the widow, charged with a duty; and, so long as she performed that duty, she was entitled to the dividends: and that that case was distinguishable from the present on other grounds: first, the dividends only of the trust-funds were to be applied by the widow; but, in the present case, the *proceeds* or *corpus*, as well as the income of the shares, were made applicable to the maintenance, education and advancement of the children: secondly, that the words: "as she shall think proper," which were found in that case, were omitted in this: that those words were very important; as they gave the widow the absolute power and control over the application of the income of the shares: lastly, that, in this case, the widow, herself, had become the trustee, in consequence

of the disclaimer of the trustees appointed by the testator; and it would be most dangerous to leave it in her power to decide as to the amount of what ought to be applied for the maintenance &c. of her children, and also as to the manner in which it was to be applied.

1850.
BROWNE
v.
PAULL.
HOGGINS
v.
PAULL.

Mr. *Rolt* and Mr. *Bush*, for Mr. and Mrs. *Paull*, cited *Berkeley v. Swinburne* (d), *Hadow v. Hadow*, *Leigh v. Leigh* (e), *Raihes v. Ward* (f), and *Hawkins v. Watts* (g).

Mr. *Stuart* and Mr. *Gordon* appeared for Mr. *Hoggins*; and

Mr. *Teed* and Mr. *Rogers*, for the child of Mr. and Mrs. *Hoggins*.

Mr. *Bethell* replied.

The VICE-CHANCELLOR :

If the case of *Hadow v. Hadow* is rightly decided, I think that it governs this case. The only distinction between them, is that this case contains the words: "and the accumulations, if any." But I do not think that those words create any substantial distinction. My reason for thinking so, is that the testator points out two ways in which the rents and proceeds of his children's shares, should be applied for their maintenance: one is, that the trustees should pay the rents and proceeds to the wife, to be by her applied: the other is, in case the wife should die, or it should be improper, for any reason whatever, that she should continue to maintain

(d) 6 Sim. 613.

(f) 1 Hare, 445.

(e) Jurist for 1848, page

(g) 7 Sim. 199.

1850.

BROWNE

v.

PAULL.

HOGGINS

v.

PAULL.

the children, then that the trustees, themselves, should apply the rents and proceeds for the maintenance of the children. The language used by the testator, is this : " and, in the mean time, to pay, unto my said wife, or otherwise apply the rents and proceeds of the respective shares and interests of my said children, in my said estate and effects, for or towards their respective maintenance, education and advancement." If the will had stopped there, it is quite clear that the income of the shares would have been given to the wife, without any liability on her part, to account. But the will proceeds thus : " but in case of the decease of any or either of my said children under the age of twenty-one years, then upon trust to convey, assign or transfer the share or shares of such one or more of them as shall die under that age, and the accumulations, if any, unto and equally between such of my said children as shall live to attain that age." Do, then, those words make the fund, which, under the preceding words, was not subject to account, subject to account in the hands of the wife ? I cannot see that they do : for those words might be necessary in one of the events which the testator had in his contemplation ; namely, the event of the fund being applied, by the trustees, for the maintenance of his children. And a similar direction occurred in *Hadow v. Hadow* : for, there, the dividends were to be paid to the wife, to be by her applied, or, in case of her death, to be applied, by the trustees, for the maintenance of the children. I cannot, therefore, see that there is any real difference between the two cases. I will, however, consider the case, before I finally dispose of it.

The only other observation that I shall now make, is that the case of *Leigh v. Leigh* does not, materially, bear upon the present. There, the testator, after directing

his trustees to pay an annuity to his wife, so long as she should continue his widow, directed them to pay the remainder of the income of the trust property to her, during the same time, for the purpose of enabling her to bring up, educate and maintain her children. Therefore there was a motive for the gift, but there was no trust, in terms, connected with the gift; therefore, that case has no material bearing on the present.

1850.
BROWNE
v.
PAULL.
HOGGINS
v.
PAULL.

The VICE-CHANCELLOR :

9th Dec.

The only question in this case, on which I desired time to enable me to look into the authorities, was as to the right of Mrs. *Paull*, formerly Mrs. *Harwood*, to the surplus income of the testator's estate, which remained after providing for the maintenance and education of the children.

The testator, by his will, gave all his estate, real and personal, to two trustees upon trust, &c. &c. Mrs. *Harwood* received the whole income of the estate during her widowhood and for about a year after her marriage with Mr. *Paull*. This suit was then instituted, and a receiver was appointed. But, between the time of the testator's decease and the institution of this suit, the income received by Mrs. *Harwood*, now Mrs. *Paull*, was more than sufficient to enable her to maintain the children; so that, as appears by the *Master's* report, a considerable surplus remained in the hands of Mrs. *Harwood*. The question is, whether that sum belongs to her or to the children; and that depends on the construction which is to be put on the clause of the will to which I have already referred. I am of opinion that, on the authorities, there was no trust here for the benefit of the children, which gave them any interest in the fund directed to be paid over to their mother during

1850.
 BROWNE
 v.
 PAULL.
 HOGGINS
 v.
 PAULL.

their minorities, beyond what was applicable for their maintenance, education or advancement. I could not come to any different conclusion, unless I was prepared to say that I would not abide by the principles laid down and acted upon in the cases of *Berkeley v. Swinburne* and *Hadow v. Hadow*.

In the former of those cases, the testator gave his real and personal estate to trustees, upon trust to convert the same into money, and to invest the money on securities for the benefit of the younger children of his two sisters, *Henrietta Sophia*, the wife of *Robert Berkeley*, and *Caroline Martha*, the wife of *Grantley Berkeley*, to be vested interests in sons at twenty-one, and in daughters at twenty-one or marriage; and there was a proviso that, during the minority of every such son and during the minority and discoverture of every such daughter, the trustees should pay the dividends, interest and produce of the share of each such child respectively, unto his said sisters respectively, or, in case of their deaths respectively, unto the guardians for the time being of such child respectively, to be applied in and towards the maintenance and education of such child or otherwise for his or her use and benefit. The *Vice-Chancellor of England* there held that the sisters took beneficial interests in the income of their children's shares of the residuary estate. His Honour's judgment is very short, and no reasons are given; but it evidently proceeded on the ground that where, during the minority of a child, the interest of such child's legacy is directed to be paid to the parent, to be applied for or towards its maintenance, there the direction as to the application, is a mere charge, for the benefit of the child, on what is, substantially, a gift to the parent subject to such charge.

The other case of *Hadow v. Hadow* was to the same effect. There the testator, after giving one third of his residuary estate to his son *Reginald*, and one other third to his son *Henry John*, to be paid to them respectively on their attaining the age of twenty-one years, proceeds to direct that, until such shares shall be payable to his said sons respectively, the dividends thereof shall be paid into the proper hands of his wife, *Jane Hadow*, to be by her applied, or, in case of her death, to be applied by the trustees, for and towards the maintenance, education and advancement of his said sons as she or they might think proper. Here, as in the former case, his Honour held that the testator meant that the wife should have the income of the children's property, to maintain them during minority, without account.

It must not be taken that, in either of those cases, the mother could have appropriated the fund to her own purposes, without maintaining the children. That is certainly not the doctrine of this Court, as is pointed out, by Vice-Chancellor *Wigram*, in the case of *Raihes v. Ward*; where the subject is fully discussed. The parent, to whom trustees are directed to pay dividends under a bequest like the present, is clearly bound to apply a competent sum in the maintenance of the child or children; and, however difficult it may be to decide what is the amount to be applied, yet this Court holds that to be a matter capable of being ascertained, and will compel the parent to do what is right. But I find no authority conflicting with the two cases of *Berkeley v. Swinburne* and *Hadow v. Hadow*, which I consider to have decided that, where the interest of the children's legacies is given, to a parent, to be applied for or towards their maintenance and education, there, in the absence of anything indicating a contrary intention, the

1850.

BROWNE

v.

PAULL.

HOGGINS

v.

PAULL.

1850.

BROWNE

v.

PAULL.

HOGGINS

v.

PAULL.

parent takes the interest subject to no account, provided only that he discharges the duty imposed on him of maintaining and educating the children.

At the hearing of this case, I expressed some doubt as to the propriety of those decisions; and it is but just, therefore, that I should now say that further reflection has led me to think that my doubts were not well-founded. The language in which the gift in this case and in those to which I have referred, is couched, is, perhaps, not inconsistent with either construction. But it is always extremely improbable that a testator can mean that a parent shall keep an accurate account of all money expended in the maintenance and education of a child, forming, as that child ordinarily does, part of the parent's establishment. The great probability always is that nothing more was intended than that the parent should adequately maintain and bring up the child: and I have no hesitation, therefore, in following the two decisions I have referred to.

My attention was called, by Mr. *Bethell*, to the language of the clause in this will, according to which the trustees are directed to pay over, to the widow, the rents and proceeds of the respective shares and interests of the children, to be applied for or towards, not only the maintenance and education, but also the advancement of the children; and, coupling this with the power of sale which is contained in the will, Mr. *Bethell* argued that the doctrine contained in the cases before the late *Vice-Chancellor*, would not apply; for that, here, the whole *corpus* of the property might get into the hands of the parent. But I do not think this makes any difference. In *Hadow v. Hadow*, the same words occurred as in this, with reference to the advance-

ment; and I very much doubt whether the word, "proceeds," which is found in this will, refers to anything more than the annual income of the personal estate. But, even if it did, the case would not be varied. No doubt, so far as the *corpus* is concerned, the mother would be a mere trustee; but the doctrine as to income, would not, in my opinion, be affected.

I stated, at the hearing, that the reference to accumulations, does not affect the construction. The expression is, accumulations, if any; and such a provision was very necessary; for, though there could be no accumulations for the benefit of the children while the fund was paid over to the mother, yet it might be different as soon as the trustees, in the exercise of their discretion, should cease to trust the mother, and should, themselves, provide for the children's maintenance; for *they* would, certainly, be mere trustees and liable to account. The provision as to the accumulations, is, therefore, quite consistent with the construction I put on the clause.

The result is that the children are not entitled to any account of the accumulations; and, therefore, Mr. and Mrs. *Paull* are in no default, and so will have their costs.

1850.
BROWNE
v.
PAULL.
HOGGINS
v.
PAULL.

1850 :
22nd, 23rd, and
25th Nov.

Parties.
Redemption.
Judgment-
creditor.
Registry Acts.
Mortgagor and
mortgagee.

A judgment-creditor, whose judgment was registered pursuant both to the Registry Act for the West Riding of Yorkshire, (5 & 6 Anne, c. 18,) and the 1 & 2 Vict. c. 110, filed a bill to redeem a prior mortgagee of lands in the West Riding, and to foreclose the mortgagor. The mortgagor had confessed other judgments, and the conusees had registered them pursuant to the 1 & 2 Vict. c. 110, *but not under the West Riding Act.* Held that those conusees were not necessary parties to the suit.

Benham & Keane v. Johnson
Benham & Keane v. Johnson
JOHNSON v. HOLDSWORTH.

THIS was a claim by a judgment-creditor (whose judgment was registered in 1848, pursuant both to the 5 & 6 Anne, c. 18, s. 4, and 1 & 2 Vict. c. 110, s. 13,) to redeem a mortgagee, in possession of lands in the West Riding of Yorkshire, whose mortgage was made in 1846, and to foreclose the mortgagor.

On the claim coming on to be heard,

Mr. *Amphlett*, for the mortgagee, said that the mortgagor had confessed other judgments which had been registered pursuant to the 1 & 2 Vict. c. 110; and that, though they had not been registered pursuant to the 5 & 6 Anne, c. 18, the mortgagor, of course, *had notice of them*; and, therefore, the conusees, ought to be made parties to the suit, in order that the mortgagee might not be called upon to account more than once : *Davis v. Lord Strathmore* (a).

Mr. *Bethell*, for the Plaintiff, said that *Davis v. Lord Strathmore* was a suit between a vendor and a purchaser; and that it was held, in that case, that, as the purchaser took his conveyance with notice of an undocketed judgment against the vendor, the notice affected his conscience, and, therefore, raised a *personal* equity against him: but that a personal equity, was distinct from a charge on land; and that a judgment-creditor, whose judgment was unregistered, had no *jus in re*; or,

(a) 16 Ves. 419.

in other words, had no charge upon or interest in the land of his debtor ; and, therefore, could not claim to redeem it, if it was subject to a mortgage.

1850.
JOHNSON
v.
HOLDSWORTH.

Mr. *Amphlett* :

The judgment-creditors, in this case, may register their judgments to-morrow ; and then they will take effect from the time when they were entered up.

Under the 13th section of the 1 & 2 Vict. c. 110, a judgment-creditor has a lien on the land of his debtor, though his judgment has not been registered pursuant to the Act of Anne ; and the only consequence of his not having registered his judgment under the last-mentioned Act, is, that a subsequent judgment-creditor may gain priority over him by registering his judgment.

Mr. *Bethell* :

If the judgment-creditors who are said to be necessary parties to this suit, should register their judgments, they will, in effect, be brought into existence *pendente lite* ; for judgments operate only from the time of their registration ; and the Plaintiff in a suit need not make any persons parties to it whose interests were acquired subsequent to the institution of it.

The VICE-CHANCELLOR :

25th Nov.

This was a claim to redeem.

The Plaintiff, *Johnson*, is a judgment-creditor of, *Holdsworth*, who is the owner of the equity of redemption of certain lands in the West Riding of *Yorkshire*.

1850.
 JOHNSON
 v.
 HOLDSWORTH.

Johnson's judgment has been duly registered at *Wakefield*, as required by 5 Anne, c. 18, s. 4: and he has served the mortgagee and *Holdsworth*, but no other parties. The mortgagee objects that he ought to have made subsequent judgment-creditors of *Holdsworth*, co-Defendants. *Johnson* replies that their judgments have never been registered as required by the statute of Anne. That being so, the question is, are they necessary parties?

Now consider the question, first as it would have stood before the statute 1 & 2 Vict. c. 110.

The statute of Anne says no judgment shall affect lands in the West Riding, but only from the time of registry: therefore, before registration, a judgment-creditor has no right against the lands of his debtor, legal or equitable. The statute has no exception of equitable rights: but then it is said that equity puts parties who have notice of unregistered judgments or incumbrances, in the same position as if they had been registered. This is stating the proposition too broadly. All that equity has done is this: where a purchaser has paid his money to a vendor, with notice of an unregistered judgment against that vendor, there this Court has held that such a purchaser shall not, to the prejudice of the judgment-creditor, shelter himself behind the Registry Acts, which were made to protect parties against charges of which they had no notice, and not against those which were known to them. Whether that was, originally, a line of decision conformable to the scope and policy of the Registry Acts in general, I need not inquire. But the equity so enforced is merely a *personal* equity, arising out of the character of vendor and purchaser; an equity affecting the conscience of a party paying

money with notice: and the doctrine has no application to a case like the present. A second mortgagee, filing a bill to redeem, is bound, for the security of the first mortgagee and to prevent him from being called on to have the same account taken a second time against him, to bring, before the Court, all the parties who might call for a redemption of the first mortgage; that is, the mortgagor and parties entitled under him to subsequent incumbrances. But, in the register counties, an unregistered judgment-creditor is not, either at law or in equity, an incumbrancer, although he has rights which, as against a party purchasing the estate and paying his purchase-money with notice of the judgment, may give him the same benefit, in this Court, as if he were an incumbrancer. This principle has, obviously, no application to the case of a Plaintiff, a second incumbrancer, filing a bill to redeem. So that, on the law as it stood before the 1 & 2 Vict. c. 110, I think unregistered judgment-creditors were not necessary parties to such a suit.

1850.
JOHNSON
v.
HOLDSWORTH.

The only remaining question is, whether the case is varied by the late statute of 1 & 2 Vict. c. 110, s. 13: whether the effect of that statute is to make all judgment-creditors, unregistered as well as registered, equitable incumbrancers on the lands of their debtors? I think not. I expressed an opinion, a few days since (*a*), that the effect of that statute is to make every judgment-creditor an equitable incumbrancer on whatever lands or hereditaments of his debtor he might, before the statute, have taken under an *elegit*.

What is now contended for is that the clause goes much further, and makes the judgment a charge,

(*a*) See *Hawkins v. Gathercole*, *ante*, p. 63.

1850.

JOHNSON

v.

HOLDSWORTH.

whether it is registered or not : but I cannot concur in that view of the case.

In the first place, it is impossible to suppose that the Legislature could have meant to alter the Registry Acts by a side-wind, as it were, and without ever alluding to them. But, independently of this general consideration, it seems to me abundantly clear, on the face of the Act, that no such intention is to be collected from it. By section 11, it is enacted that it shall be lawful for the sheriff to whom an *elegit* shall be directed, to deliver execution, to the judgment-creditor, of all the debtor's lands, as, before the Act, he might of a moiety ; but there is no power, to the judgment-creditor, to obtain an *elegit* on any judgment on which he could not have obtained it before. It is certain, therefore, that, in a register county, no unregistered judgment-creditor can get execution against his debtor's lands ; and, that being so, it would be impossible to hold that, under the 13th section of the Act of Vict., the creditor becomes an equitable incumbrancer, without admitting the strange anomaly that the judgment-creditor is to have the equitable right, although he has not the legal right to which the equitable right was intended to be superadded. My opinion is that the thirteenth section, notwithstanding the generality of its language, must be read as applying only to judgments legally perfected, so as to affect the lands of the debtor, and on which the creditor might sue out an *elegit*. This construction, therefore, excludes unregistered judgments in *Yorkshire* : and the result is that, according to my view of the case, the Plaintiff here has brought all necessary parties before the Court, and so is entitled to the usual decree in a suit like the present.

BALGUY v. BROADHURST.

THE Defendant admitted the allegation in the bill, that he had documents, in his possession, relating to the matters mentioned in the bill; but denied that, from those documents or any of them, if produced, the truth of the matters in the bill stated or of any of them, would appear, save as such matters were admitted by his answer or thereby appeared to be true. He added that some of those documents *had been procured, by his solicitor, since the institution of the suit, and for the purpose of his defence to it*; and that the same were, *as he was advised and insisted*, confidential communications; and that, and for that reason, he refused to set forth any list or schedule of such last-mentioned documents or to produce the same, or to make any discovery relating thereto.

Mr. *Bethell* and Mr. *Amphlett*, in support of exceptions to the answer for insufficiency, said that the reason assigned, by the Defendant, for not setting forth a list of the last-mentioned documents, was not sufficient.

Mr. *Rolt* and Mr. *G. L. Russell*, for the Defendant, relied on the allegation, in the answer, that the documents had been procured, by the Defendant's solicitor, since the institution of the suit, and for the purpose of his defence to it; and cited *Holmes v. Baddeley* (a), *Curling v. Perring* (b).

(a) 1 Phill. 476.

(b) 2 Myl. & Keen, 380.

1850:
2nd Dec.

Answer.
Insufficiency.
Defendant.
Privileged
communications.

A Defendant admitted that he had, in his possession, documents relating to the matters in the bill; but refused to set forth a list of them, because they had been procured by his solicitor, since the institution of the suit, and for the purpose of his defence to it; and the same were, *as he was advised and insisted*, confidential communications.

Held that the allegation relative to the documents did not justify the Defendant's refusal to set forth a list of them; and, therefore, that his answer was insufficient.

1850.

BALGUY
v.
BROADHURST.

The VICE-CHANCELLOR:

Judges have differed in their opinions as to the general policy of the rule as to privileged communications. Some of them have thought that there ought to be no such rule. Others have been of a contrary opinion, and have said that even truth may be purchased too dearly. The rule, however, is now established and acted on; and, whatever may be thought of it, I am sure that it is most inconvenient to have a rule laid down and the Courts struggling to avoid it. Therefore I shall abide by the rule in all cases to which it really applies.

But it would be very dangerous to extend the rule to a case where the Court is not told what the documents are; and still more so, where the Defendant does not even assert his own opinion that they are confidential communications. Here, he only asserts that he is advised and insists that they are confidential communications: and his Counsel have contended that it is sufficient for him to say that they were procured for the purpose of his defence to the suit. But they may have been so procured, and yet not be privileged communications. They may have been procured from the British Museum, or they may be the Plaintiff's title-deeds. The Defendant does not give any statement which will exclude either of those suppositions. I do not mean to say that he might not have framed his answer so as to protect him: but his answer is not so framed; and, therefore, I shall allow the exceptions.

LYNE v. PENNELL.

THE following question arose in this case: whether a *Defendant* could file a supplemental bill for the purpose of bringing a new party before the Court, without making all the persons who were parties to the original suit, parties to the supplemental bill. The new party was the official assignee of a bankrupt who had been appointed in the place of a deceased official assignee; and the latter had been a Defendant to the original bill.

Mr. *Rolt* and Mr. *Prior* contended that all the Defendants to the original bill, were necessary parties to the supplemental bill.

Mr. *James Parker* and Mr. *Dean*, *contra*, said that the suit was an interpleading suit, and that a decree had been made in it; and, therefore, the Defendants to it were in the situation of Plaintiffs as well as Defendants.

In the course of the argument, *Bignall v. Atkins* (a) and *Feary v. Stephenson* (b) were referred to.

The *Vice-Chancellor* said that, as a Defendant to an interpleading suit stood, after decree, in the anomalous situation of Plaintiff as well as Defendant, he might file a supplemental bill for the purpose of bringing a new Defendant before the Court, without making the other parties to the original suit, parties to it, as a Plaintiff in an ordinary suit, might do.

(a) Madd. & Geld. 369.

(b) 1 Beav. 42.

1850:
11th Dec.

*Interpleading
suit.
Supplemental
bill.
Parties.
Pleading.*

A Defendant to an interpleading suit, may, after decree, file a supplemental bill to bring a new party before the Court, without making the other parties to the original suit, parties to it.

1850:
13th Dec.

Claim.
Parties.
Residuary
legatee.

WATSON v. YOUNG.*

THIS was a claim filed by *some* of the residuary legatees under a will against the executors.

Mr. *Greene* appeared for the Plaintiffs.

Some of the residuary legatees under a will, may file a claim against the executors, without making the other residuary legatees parties; but the others ought to be summoned before the *Master*.

Mr. *Bates*, for the executors, submitted that the other residuary legatees ought to have been made Defendants. But

The *Vice-Chancellor* held that they were not necessary parties, but that they ought to be summoned to appear before the *Master* (a).

* *Ex relatione.*

(a) See the 13th Order of April 1850.

SIMMONS v. RUDALL.*

THE bill stated that *Benjamin Thomas*, late of the *Haymarket* in the city of *Westminster*, signed and pub-

* Complaints are, frequently made, in Court, of errors in copying briefs and other papers in a Cause. In one of the briefs

1850 :
3rd and 4th
December.
1851 :
8th February.
Heir.
Statute of
Limitations.

A testator died in 1821, having devised and bequeathed his real and personal estate to trustees upon certain trusts. In 1826 a bill was filed for the execution of the trusts as to the *personal* estate. In 1847 a supplemental bill was filed raising questions on the will, as to the *real* estate, in which the heir, who was then unknown, was interested : and, in 1849, another supplemental bill was filed to bring the heir, who was then ascertained, before the Court.

Held that the heir was barred, by lapse of time, from claiming the real estate adversely to the trustees ; but that he was not barred from claiming part of the real estate as being, in the events that had happened, undisposed of and held, by the trustees, in trust for him.

Will.—Construction.—Residuary devise and bequest.

Testator bequeathed *Greenacre* to *Catherine S.* for life, with remainder to her son, *John S.*, in fee; provided that if he should die in his mother's lifetime, *then and in such case*, the testator gave *Greenacre, together with all the residue of his real and personal estate*, to trustees, in trust for *Isabella A.* for life, remainder in trust, as to one-fourth, for such persons as she should appoint by will ; and *upon further trust*, to divide, convey, assign and transfer *all the rest, residue and remainder of the trust property*, unto and to the use of *Maria C., Rose B., and John S.* absolutely. *John S.* survived his mother, and *Isabella A.* died intestate.

Held that the trustees took the residuary real estate on the testator's death ; and that *Maria C., Rose B. and John S.* were not entitled to the one-fourth of the property which was subjected to *Isabella A.*'s appointment, but that it was undisposed of.

Will.—Erasures and interlineations in a will.

A testator who died in 1821, struck the name of one of the *devisees* out of his will, and interlined the names of two other persons above the erasure ; but those alterations were not noticed in the attestation clause, nor was there anything to show, or from which it could be inferred that they were made before the will was executed.

Held that they did not affect the devise.

1850.

SIMMONS

v.

RUDALL.

Will.

lished his last will and testament in writing, and that the same was in such words and figures, and with such erasures and alterations, and of such date as therein after set forth, namely:—" *London* 24th June 1813. As to all worldly goods which it hath pleased God to bless me with, I give and dispose thereof as follows: After paying my just debts, funeral expenses &c. &c. I give and devise unto *Catherine Simmons*, of *Castle Street Leicester Square*, all my freehold messuage or tenement and premises, with the appurtenances and land thereunto belonging, at *Weston Green* in the parish of *Thames Ditton* in the county of *Surrey*, now in the occupation of *Adam Reid*, gardener, during the term of her natural life, to and for her sole and separate use and benefit, and not to be subject or liable to the debts, controul or interference of any husband with whom she may intermarry, and her receipt and receipts only to be a discharge for the rents and profits of the said premises: and, from and after her decease, I give and devise the same unto her son *John Simmons*, ^{of the same place} to hold to him and his heirs for ever. Provided always, and my will and meaning is that, in case the said *John Simmons* shall happen to depart this life intestate or

Erasure and
interlineation.

in this Cause, the name of *Mrs. Rudall*, who was a Co-defendant with her husband, was stated to be *Nathaniel Isabella*: and a supplemental bill which was filed for the purpose of bringing the heir of the testator before the Court, was stated to have been filed on the 13th of September, 1829, instead of 1849. It will be seen, on perusing the case, that if that bill had been filed in 1829, one of the questions in the case could not have arisen. It is scarcely necessary to observe that errors in copying, are as perplexing to Reporters as they are to Counsel and as likely to mislead the one as the other.

under the age of twenty-one years, without leaving any issue of his body lawfully begotten, before the demise of his said mother, *then and in such case* I give and devise the said freehold estate, premises and land, *together with all the rest, residue and remainder of my real and personal estate and effects* of what nature or kind soever, unto *John Cowell, of Water Lane, and Thomas Bradley, of Mark Lane*, both in the city of *London*, merchants, and the survivors of them, and the heirs, executors and administrators of such survivor, upon trust that they or the survivors of them, shall and do place the monies that shall arise from my personal estate and effects, out at interest on public or private securities, and, from time to time, pay, apply and dispose of the yearly interest and produce thereof, together with the yearly rents, issues and profits arising from and out of my real estate, when and as the same shall become due and payable and be received by them or either of them, into the proper hands of *Sarah Armstrong, of Winchester Row Paddington*, in the county of *Middlesex*, widow, for and during the term of her natural life; and, from and after her decease, upon trust to pay and apply the said yearly interest, dividends, increase and produce, rents, issues and profits, into the proper hands of *Isabella*, daughter of the said *Sarah Armstrong*, for and during the term of her natural life, for her own sole and separate use and benefit, whose receipt or receipts alone shall be sufficient discharges to the person or persons paying the same, notwithstanding her coverture, to the intent that the same may not be at the disposal of or subject or liable to the controul, debts or engagements of any her husband, but only at her own sole and separate disposal, as if she were sole and unmarried; and, from and immediately after the decease of the survivor of them the said *Sarah Armstrong* and *Isabella*

1850.

SIMMONS
v.
RUDALL.

1850.

SIMMONS

v.

RUDALL.

her daughter, upon trust that the said trustees, or the survivor of them, his heirs, executors and administrators, do and shall pay, convey, assign and transfer one equal fourth part of all the said trust-monies, together with the interest and dividends, increase and produce thereof from thenceforth to accrue and grow due thereon, and also of the said residue and remainder of my real estate, unto and to the use and uses of such person or persons, and to such intents and purposes as the survivor of them, the said *Sarah Armstrong* and *Isabella* her daughter, shall, in and by her last will and testament, give, devise and bequeath the same; and *upon further trust* to divide, convey, assign and transfer all the rest, residue and remainder of the said trust-monies and real estate, unto and to the use and uses of *Kathe-*

Interlineation.

and *Maria*
rine [^] daughters of *Thomas Cutting* and *Maria Cut-*
ting his wife, of *Rushmere* in the county of *Suffolk*,
Mary Anne

Erasure and
interlineation.

Ree [^] *Bradley* daughter of *Thomas Bradley* of *Mark*
Lane aforesaid, and *John Simmons* before-mentioned, their
heirs, executors, administrators and assigns, equally
between and among them, share and share alike, at
their respective ages of twenty-one years: but in case

Interlineations
and erasure.

and *Maria Cutting*
one or more of them the said *Katharine Cutting*, [^]

Mary Anne
Ree [^] *Bradley*, and *John Simmons* shall depart this life
before her or his or their distributive share thereof shall
become payable and transferable as aforesaid, then upon
trust to pay convey and transfer the share or shares of
her, him or them so dying, equally among the survivors
or survivor, share and share alike, together with their
original shares of the said principal money and real
estates; and, in the mean time and until their said re-
spective distributive shares thereof shall become due and

transferable, to pay and apply the said interest and profits equally and among them, from the time of the decease of the survivor of them, the said *Sarah Armstrong* and *Isabella* her daughter. Also I nominate and constitute *John Cowell* and *Thomas Bradley* before-named, executors of this my will: and I give, to each of them, fifty guineas to be retained, by them, as some compensation for their care, diligence and trouble respecting the execution of this my will: and I do hereby declare that my said trustees and executors shall not be chargeable or answerable for more of the aforesaid monies and effects than they shall actually receive or come to their respective hands, nor shall one be accountable for the acts and deeds of the other. In witness whereof I have here-

1850.
SIMMONS
v.
RUDALL.

unto set my hand and seal the twentieth ^{fourth} day of June, in the year of our Lord, 1813.—*B. Thomas*. (L. s.)
—Signed, sealed, published and delivered by the above named *Benjamin Thomas* the testator, as and for his last will and testament, in the presence of us, who, as well in his presence as in that of each other, at his request, have subscribed our names.—*Charles Baynes*, solicitor and attorney, *Westminster*. *Thomas R. Fiske*, solicitor, *Stowmarket, Suffolk*. — *Josh. Pilkington*, servant to Mr. *Thomas*.—N.B. The above alterations respecting *Maria Cutting* and *Mary Anne Bradley* were made by me.—*B. Thomas*."

Erasure and
interlineation.

The testator, by a codicil dated the 15th of November 1819, gave a tontine order for 100*l.* and small pecuniary legacies to certain persons none of whom were named in his will.

The testator died on the 21st of October 1821; and, Death of tes-
tator.

1850.

SIMMONS

v.

RUDALL.

in November following, his will was proved by *Thomas Bradley* alone.

Sarah Armstrong died on the 2nd of November 1823. After her death, her daughter, *Isabella*, married *John Cutting*.

Original suit.

On the 7th of April 1826, *John Simmons* and *Mary Anne Bradley* filed a bill, against *Thomas Bradley*, *John Cutting* and *Isabella* his wife and *Catherine* and *Maria Cutting*, for the administration of the testator's personal estate, and to have the residue of it secured for the benefit of themselves and the other persons interested therein. The decree in that Cause was made on the 30th of November 1826; and orders on further directions in it, were made in March 1830, July 1831 and January 1834.

Deaths of *T. Bradley* and *Isabella Cutting*.

Thomas Bradley died in January 1846. His widow, *Kitty Bradley*, was his executrix. *Isabella Cutting* died, in December 1846, without having exercised the power of appointment given to her by the testator's will. Her husband was her administrator.

First supplemental suit.

On the 1st of September 1847, at which time *Catherine Cutting*, *Maria Cutting* and *Mary Anne Bradley*, were married, respectively, to *William Rudall*, *Thos. H. Meadows* and *James Anford*, the bill in the Cause mentioned in the title to this case, (which was termed a bill of revivor and supplement,) was filed, by *John Simmons*, against Mr. and Mrs. *Rudall*, Mr. and Mrs. *Meadows*, Mr. and Mrs. *Anford*, Mrs. *Bradley*, *John Bradley*, the son and heir of *Thomas Bradley*, and persons claiming under Mr. and Mrs. *Meadows* and Mr. and Mrs. *Anford*. After stating the will of the tes-

tator, and the bill, decree and orders in the original suit instituted in April 1826, and also the facts hereinbefore mentioned, it alleged that the original suit was imperfect in its frame, and was not constituted so as to obtain a complete distribution of the testator's personal estate, nor a proper declaration of the rights and interests of *Simmons* and the other persons interested in the testator's residuary real and personal estate*: that, under the will, a question arose whether, by reason of *Isabella Cutting* not having exercised the power of appointment, reserved to her by the will, over the one-fourth part of the real and personal estate thereby made subject to such power, such one-fourth part of the said real and personal estate, passed under the residuary devise and bequest contained in the will, or whether the testator died intestate as to the same: and that further questions also arose, upon the will, as to the effect of the devise, therein contained, of the residuary real estate, by reason of the erasures, alterations and interlineations contained in the will: and that further questions also arose as to whether, by reason of the said erasures, alterations and interlineations, the testator did not die intestate as to some portions of his real estate. The bill then stated that the testator's residuary personal estate remaining to be administered, consisted of 1265*l.* Consols and 155*l.* cash; and that his real estates, other than the messuage, land and premises at *Weston Green* in the parish of *Thames Ditton* (which were specifically devised by his will) consisted of two freehold messuages, one situate in *Vere Street*, and the other in *Drury Lane*, and a fee-farm rent issuing out of certain lands in *Essex*: that *Thomas Bradley* survived *John Cowell*, and died intestate as to the real estates devised by the

1850.

SIMMONS
v.
RUDALL.

Questions on
the testator's
will.

* The original suit related, solely, to the testator's personal estate.

1850.

SIMMONS

v.

RUDALL.

Construction of
the will con-
tended for by
Plaintiff.

testator's will: that the testator, according to the true construction of his will, did not die intestate as to any part of his real or personal estate; and that, as to the one fourth thereof which was subjected to the appointment of *Isabella Cutting*, the same, upon her death and in default of such appointment, became subject to the dispositions made, by the will, as to the other three-fourths of the real and personal estates respectively; and that the said one-fourth of the personal estate was distributable amongst the Plaintiff and Mr. and Mrs. *Rudall*, Mr. and Mrs. *Meadows* and Mr. and Mrs. *Anford*, in equal fourth parts; and that the testator's real estate, other than the messuage and premises at *Weston Green*, was divisible, in moieties, between the Plaintiff and Mrs. *Rudall*; for that the will, *as originally executed and attested*, devised the real estate equally between the Plaintiff and Mrs. *Rudall* and *Rose Bradley*, and that, *by the erasure of the name, Rose, the devise to her was effectually revoked; but that the insertion of the names of Mrs. Meadows and Mrs. Anford, as devisees, was ineffectual* to constitute them or either of them devisees or a devisee of the real estate or any part thereof, by reason that such insertion was made, by the testator, *after he had executed his will, and he never afterwards republished or re-executed it*: that Mr. and Mrs. *Meadows* and Mr. and Mrs. *Anford*, disputed the Plaintiff's construction of the will, and claimed to be entitled to the testator's real estate in the same proportions as they were entitled to his personal estate: *that the Plaintiff had been unable to discover who was the testator's heir at law or next of kin*: that the original suit was abated in consequence of Mrs. *Anford's* marriage: and that, by reason of the conflicting claims, of her and her husband and the Plaintiff, in respect of the testator's real estate, they could not be properly joined

as Co-plaintiffs with the Plaintiff in respect of the supplemental relief sought by the now stating bill as to the real estate.

1850.
SIMMONS
v.
RUDALL.

The bill prayed that the original suit might be revived ; that the suit instituted by the now stating bill, might be deemed to be supplemental to the original suit ; and that the rights and interests of the Plaintiff and all other parties in the testator's residuary real and personal estate, might be ascertained and declared ; and that proper inquiries might be directed to ascertain the testator's heir-at-law and next-of-kin.

Mr. and Mrs. *Rudall*, Mr. and Mrs. *Meadows* and Mr. and Mrs. *Anford*, in their answers, said that they were unable to set forth whether the alterations in the will were made, by the testator, before or after he had executed it, or whether he afterwards re-executed it : and Mr. and Mrs. *Rudall* added that they were desirous to concur, with the Plaintiff, in making an equal distribution, of the testator's estate, amongst the parties named in his will, in order that his manifest intention might not be defeated by a mere legal informality. Mr. and Mrs. *Meadows* submitted their rights and interests under the will, to the judgment of the Court : and Mr. and Mrs. *Anford* disputed the Plaintiff's construction of the will and claimed to be entitled to the testator's real estate in the same proportions as they were entitled to his personal estate.

On the 8th of February 1848, an order was made, in the suit instituted in September 1847, by which the *Master* was directed to inquire and state when and by whom and under what circumstances the erasures, alterations and interlineations appearing upon the

1850.

SIMMONS

v.

RUDALL.

original will, were made, and in whose handwriting the original will and the memorandum at the foot of it, were; and who was the heir-at-law of the testator at his death, and whether such heir was living or dead, and, if dead, *in whom the estate of such heir in the real estate of which the testator died seised, if he died intestate, would be vested*; and who were the next-of-kin of the testator living at the time of his death, and whether they were living or dead, and, if dead, who were their respective legal personal representatives.

Report as to the
testator's heir
and next-of-kin.

In pursuance of that order, the *Master* made a separate report, dated the 6th of August 1849, finding that *Anne* the wife of *John Williams*, was the heir-at-law and sole next-of-kin of the testator at his death; that *Thomas Williams*, her eldest child, was baptized on the 30th of December 1815; that *Anne Williams* died on the 5th of March 1823 and that her husband died on the 2nd of October 1844; and that, on the 19th of April 1849, letters of administration to both of them, were granted, by the Prerogative Court, to *Thomas Williams*: and that the estate of *Anne Williams*, as such heir-at-law of the testator, in the real estate of which the testator died seised, if he died intestate, was vested in *Thomas Williams*.

Second supple-
mental suit.

On the 13th of September 1849, *John Simmons* filed a bill, against *Thomas Williams*, stating the bill, decree, reports and orders in the original suit, and the bill filed on the 1st of September 1847, (which it termed a bill of revivor and supplement,) and the order of the 8th of February 1848, and the report made in pursuance of it; and stating also that *Thomas Williams* alleged that the testator died intestate as to some parts of his real and personal estate, and claimed to be entitled

thereto; and praying that the proceedings in the said suits might be carried on and prosecuted, and that the Plaintiff might have the same relief, against *Williams*, as if he had been, originally, a *Defendant to the said original bill and bill of revivor and supplement.*

1850.
SIMMONS
v.
RUDALL.

Williams's answer submitted, to the judgment of the Court, whether the testator died intestate as to any part of his real or personal estate; and whether the Plaintiff was entitled to have the same relief, against him, as, by the original bill and the bill of revivor and supplement, was prayed against the several parties thereto.

On the 16th of January 1850, the *Master* made his general report in pursuance of the order of February 1848, and thereby found that the testator made his will, as it appeared to have been written on the *twentieth* of June, 1813, in manner following, &c. &c. The *Master* then set forth the will, without any of the erasures, alterations or interlineations in it. He next found that *Maria Cutting* was baptized on the 24th of March 1811, and that *Rose Bradley* was buried on the 7th of June, one thousand eight hundred and *sixteen*: that the testator altered his will by interlining the words, 'and *Maria*' adding the letter *s* to make the next word, 'daughters', erasing the name, '*Rose*', and interlining the names, '*Mary Anne*,' and again erasing the name, '*Rose*,' and interlining the words, '*Maria Cutting, Mary Anne*,' as appeared on the original will: and that the testator, at the same time, made the following alterations, as respected the Plaintiff, in the first page of his will, by striking out the words, 'her son,' and interlining the words, 'of the same place'; and that the testator also altered the date of his will, at the bottom of it, from the 20th to the 24th of June 1813, and added, at the top,

Report as to the
erasures and
interlineations
in the will.

1850.

SIMMONS

v.

RUDALL.

'*London, 24th June, 1813*'; and that he wrote the memorandum at the foot of his will: "N. B.—The above alterations respecting *Maria Cutting* and *Mary Anne Bradley* were made by me, *B. Thomas*"; and that such erasures, alterations and interlineations were made, by the testator, between the twentieth day of June one thousand eight hundred and thirteen, the original date of his will, and the fifteenth day of November one thousand eight hundred and nineteen, the day of the date of the codicil thereto; and that the original will and the memorandum at the foot of it, were in the testator's handwriting.

On the 3rd of June 1850, the usual decree in a supplemental suit, was made in *Simmons v. Williams*.

The suit of *Simmons v. Rudall* now came on to be heard.

Mr. *Bethell* and Mr. *W. T. S. Daniel*, for the Plaintiff.

Argument.

All the testator's property has been distributed, except his residuary real estate, and the one-fourth of his residuary personal estate over which the late *Isabella Cutting* had a testamentary power of appointment.

The first question, is whether the testator has died intestate as to part of his property, in consequence of *Jno. Simmons* not having died under twenty-one before his mother; that is to say, whether the devise of the residuary real estate, as well as the devise of the *Thames Ditton* estate, to the trustees, is made dependent on *John Simmons* dying under age and in his mother's lifetime? That question arises on the first part of the will, where the testator, after giving the *Thames Ditton* pro-

perty to *Catherine Simmons*, for life, and, after her death, to *John Simmons* in fee, proceeds thus: "Provided always, and my will and meaning is that, in case the said *John Simmons* shall happen to depart this life, intestate or under the age of twenty-one years, without leaving any issue of his body lawfully begotten, before the demise of his said mother, *then and in such case*, I give and devise the said freehold estate, premises and land, together with all the rest, residue, and remainder of my real and personal estate and effects, of what nature or kind soever, unto *John Cowell, &c.*" Now we contend that the words: "provided always, &c." are to be construed distributively, as the context requires they should be, and that they apply to the *Thames Ditton* estate, but not to the residuary real estate; and that the latter is devised, immediately, to the trustees: 1 *Jarman on Wills*, 469; *Cook v. Gerard* (a); *Sympson v. Hornsby* (b); and *Doe v. Brazier* (c). Those cases are reviewed in *Rex v. The Inhabitants of Ringstead* (d), and distinguished, from the principal case, on the ground that the distributive construction was not called for by the context of the will in that case.

1850.
SIMMONS
v.
RUDALL.

Next, we contend that the Plaintiff and Mrs. *Rudall* are entitled, beneficially, to the whole of the residuary estate. By the will, as it originally stood, the residuary real and personal estate was given to trustees in trust for *Catherine Cutting*, now Mrs. *Rudall*, *Rose Bradley*, and the Plaintiff, as tenants in common. The testator, afterwards, struck out the name of *Rose Bradley*, and interlined the names of *Maria Cutting*, now Mrs. *Meadows*, and *Mary Anne Bradley*, now Mrs. *Anford*. But

(a) 1 Saund. 180.

(c) 5 Barn. & Ald. 64.

(b) Prec. in Ch. 439.

(d) 9 Barn. & Cress. 218.

1850.

SIMMONS

v.

RUDALL.

those interlineations are neither noticed in the attestation-clause, nor proved, by the attesting witnesses, to have existed when the will was executed; and therefore, they do not affect it. The obliteration of *Rose Bradley's* name, was made on account of her death and not *animo revocandi*; and, therefore, it makes the will speak and take effect as if her name had never been inserted: and the trust to divide, convey, assign and transfer all the rest, residue and remainder of the trust monies and real estate, comprises not only the three-fourths of the testator's property which he had not before disposed of, but also the one-fourth, which became undisposed of in consequence of *Isabella Cutting* not having made any appointment of it: 1 *Jarman* on Wills, 119.

Lastly, we contend that, if the testator's heir ever had a claim to any part of the real estate, it is barred by the Statute of Limitations; for the real estate has been adversely enjoyed ever since the testator's death. Mrs. *Williams* was the heir of the testator at his death. She, it is true, was then under coverture, and continued so until 1823, when she died. *Thomas Williams*, her eldest child, was then under age, but he came of age in 1836: and, as the Statute allows only ten years in such a case, he was barred in 1846.

Mr. *Stuart* and Mr. *Willcock* for Mr. and Mrs. *Rudall*, whose interest was the same as the plaintiffs, referred to *Sympson v. Hornsby*; *Langston v. Langston* (e); and *Newburgh v. Newburgh* (f).

Mr. *Malins* and Mr. *R. W. Moore*, for Mr. and Mrs. *Anford* and the trustees of their marriage settlement, said:

(e) 2 Cl. & Finn. 194.

(f) Sugden on Real Property, 367.

1850.

SIMMONS

v.

RUDALL.

We coincide, with the Plaintiff's Counsel, as to the first question in the Cause. With respect to the second question we contend that, so far as the personal estate is concerned, it is immaterial whether the alterations were made before or after the execution of the will*. The time at which they were made, is material only so far as the real estate is concerned. And, with respect to that, we submit that, as there is no evidence to the contrary, the alterations must be presumed to have been made before the will was executed. Besides, the persons whose names are interlined, were *in esse* on the 20th of June 1813, the original date of the will. The testator, at first, intended to execute his will on the 20th of June, but did not do so until the twenty-fourth of that month: and the *Master* has found that the alterations were made between the 20th of June 1813, and the 15th of November 1819, the date of the codicil. That finding is quite consistent with their having been made before the 24th of June 1813, that is, before the execution of the will: *Clayton v. Lord Nugent* (g), and *Fitzgerald v. Fauconberge* (h).

Mr. Torriano appeared for *Benjamin Bradley*, the heir of *Thomas Bradley*,

* In a copy of the will extracted from the Registry Office of the Prerogative Court, the name of *Rose Bradley* did not appear at all; and the names of *Maria Cutting* and *Mary Ann Bradley* were written, not as if they had been interlined, but as if they had been inserted in the will when it was originally made. It will be seen, on perusing the subsequent part of this case, that *Mary Ann Bradley*, as well as *Maria Cutting*, was *in esse* at the date of the will.

(g) 13 Mees. & Wels. 200.

(h) Fitzgibb. 207, and 4 Cruise's Dig. 4th edit. 408.

1850.

SIMMONS

v.

RUDALL.

Mr. *Twells* for Mrs. *Bradley*, andMr. *Terrell* for other parties.Mr. *Rolt* and Mr. *Freeling* for *Thomas Williams*, said:

There is a great and obvious difference between the present case and *Cook v. Gerard*, *Sympson v. Hornsby* and *Doe v. Brazier*. In those cases, the devise on which the question arose, were to take effect on an event which must happen, namely, death; but the devise in question in the present case, is to take effect in an event which may not happen, namely, the death of *Simmons*, under twenty-one, without leaving issue, before the demise of his mother. And the testator says: "*then and in such case*, I give and devise, &c.:" which words, according to their strict, grammatical construction, are equivalent to: "In any other case, I do *not* give and devise." In other words, where a testator gives and devises in an event that may or may not happen, he says, in effect, that, if the event does not happen, he does not give and devise, or, which is the same thing, that, on the happening of the event, and *only* on the happening of the event, he gives and devises. But, where a testator gives and devises to *B.* after the death of *A.*, he says that *B.* shall take, but does not say that *B.* shall not take: 1 *Jarman* on Wills, 744; *Shouldham v. Smith* (i); *Holmes v. Craddock* (k); *Aspinall v. Petvin* (l); *Davenport v. Coltman* (m). Besides, the testator has said, in express terms, that the *Thames Ditton* estate and the residuary estate, shall go together: but that will not be the case if the con-

(i) 6 Dow. 22.

(l) 1 Sim. & Stu. 544.

(k) 3 Ves. 317: see judgment.

(m) 9 Mees. & Wels. 481; and 12 Sim. 588.

struction contended for by the Plaintiff's counsel, is to prevail; for it is not disputed that, as *Simmons* has not died in the lifetime of his mother, the trustees do not take the *Thames Ditton* estate. Our construction gives, to the words of the will, their natural meaning and effect: the construction contended for, alters the words, and, in fact, makes a will for the testator.

1850.
SIMMONS
v.
RUDALL.

The Counsel for Mr. and Mrs. *Rudall* cited *Langston v. Langston* and *Newburgh v. Newburgh*. In the former of those cases, the question was whether an estate tail was to be implied in the first son; and the only observation that we have to make on it, is that there was nothing to negative the implication, but there was something to affirm it. *Newburgh v. Newburgh* was treated, by the House of Lords, as a case of imperfect enumeration. Neither of those cases has anything to do with a devise such as we are now considering.

With respect to the claim of the heir being barred by the Statute of Limitations, we say, first, that a party to a suit cannot claim the benefit of that Statute unless he has either pleaded it, or relied on it in his bill: neither of which the Plaintiff in this case has done: *Lancaster v. Evors* (j). Secondly, we say that the Court has taken upon itself the execution of the trusts of the will ever since 1826, when the original bill was filed. In September 1847 a bill of *revivor and supplement* was filed in that suit; and, in September 1849, another *supplemental* bill was filed, by which the heir was brought before the Court; therefore the heir ought to be considered as having been a party to the original suit. Besides, in February 1848, the Plaintiff obtained a reference to the

(j) 10 Beav. 154 and 266.

1850.

SIMMONS

v.

RUDALL.

Master to inquire who was the heir-at-law of the testator at his death, and whether such heir was living or dead, and, if dead, in whom the estate of such heir, in the real estate of which the testator died seised, if he died intestate, would be vested. After having obtained that inquiry, and after having brought our client before the Court, as being the party in whom the testator's real estate would be vested if he died intestate, the Plaintiff is precluded from saying that he is barred by the Statute of Limitations.

Next we submit that the one-fourth of the residuary estate which was subjected to *Isabella Cutting's* appointment, is not included in the trust to divide, convey and assign all the rest, residue and remainder of the trust-monies and real estate. The testator first declares trusts as to a specific portion of the residue, and then says: "And upon *further* trust to divide," &c. It is plain, therefore, that those words apply only to the remaining portions of the residue.

Lastly, as to the alterations in the will: We say that the Statute of Frauds prevents the interlineations from having any effect so far as the real estate is concerned. For there is no evidence to show, nor is there any legal presumption (though the contrary was asserted by Mr. *Malins* and Mr. *Moore*) that the interlineations were made before the will was executed: *Knight v. Clements* (k). With respect to the striking out of *Rose Bradley's* name, we say that there is no evidence to show whether it was struck out before or after her death; nor is the time at all material: whether that act was done before or after her death, her share did not go over to the survivors, but

(k) 8 Adol. & Ell. 215.

lapsed, and the heir is entitled to it: *Rider v. Wager* (1);
1 Jarman on Wills, 119.

1850.

SIMMONS

v.

RUDALL.

Mr. *Daniel*, in reply, said that the original bill was filed to have the trusts of the will performed *as to the personal estate only*: that the real estate was not brought under the administration of the Court until 1847, when the bill of the 1st of September in that year, was filed: that that was an original bill as to the real estate; and that *Williams* was brought before the Court, by the bill of 1849, for the purpose of discussing the questions respecting the real estate which had been raised by the bill of 1847; and, consequently, his claim, (if he ever had one,) to any part of the real estate, was barred by the Statute of Limitations.

The *Vice-Chancellor*, in the course of the argument, said that, by the words, "together with," the testator meant that, in case *John Simmons* should die intestate or under twenty-one in the lifetime of his mother, the *Thames Ditton* estate should go *in the same way* as his residuary real estate.

At the conclusion of the argument, his Lordship said that there was a great deal in the case, which he must take some time to consider. But there was one point as to which he had no doubt: which was that the testator's residuary real estate, was well devised *to the trustees*; and that, if the heir ever could have claimed that property adversely to them, his claim was barred by lapse of time. In answer to the argument that the heir's rights were preserved by the institution of the suit, his Lordship observed that the filing of the bill did

(1) 2 P. W. 328, see 330.

1850.

SIMMONS

v.

RUDALL.

preserve the rights of the heir so far as he claimed a portion of the testator's property as being held by the trustees, in the events that had happened, in trust for him: but that it was a novelty to contend that the institution of a suit to carry the trusts of a will into execution, preserved the rights of a party who claimed adversely to that will.

His Lordship added that the questions which he must take time to consider, were: what was the effect of striking *Rose Bradley's* name out of the will: what was the effect of inserting in it the names of *Maria Cutting* and *Mary Ann Bradley*; and whether the last trust in the will included the entirety of the testator's residuary property, or, as the Counsel for the representative of the heir and next-of-kin had contended, only three-fourths of it; in which case one-fourth would be undisposed of, and *Williams*, as representing the heir and next-of-kin, would be entitled to it.

1851:
8th February.

The VICE-CHANCELLOR:

This case was heard before me at the sittings after last Michaelmas term. The question argued was as to the construction of the will of *Benjamin Thomas*, dated on the 20th or 24th of June 1813.

The will, as far as it need be stated, is as follows. In the first place, the testator, after giving, to *Katherine Simmons*, a freehold house at *Weston Green*, for her life, and, after her decease, to *John Simmons* and his heirs, proceeds thus: "Provided, always, and my will and meaning is that, in case the said *John Simmons* shall happen to depart this life intestate or under the age of

twenty-one years, without leaving any issue of his body lawfully begotten, before the demise of his said mother, then and in such case I give and devise the said freehold estate, premises and land, together with all the rest, residue and remainder of my real and personal estate and effects of what nature or kind soever, unto *John Cowell*, of *Water Lane*, and *Thomas Bradley*, of *Mark Lane*, both in the City of *London*, merchants, and the survivors of them, and the heirs, executors and administrators of such survivor."

1851.
 SIMMONS
 v.
 RUDALL.

Three points were made. In the first place, the heir-at-law contended that there was no devise at all, of the real estates, to the trustees; for that the devise to them was not to take effect except on the event, which did not occur, of *John Simmons* dying without issue, intestate, in the lifetime of his mother. I decided, however, against the heir-at-law on this point. The contingency, as to the death of *John Simmons*, was clearly meant to apply only to the devise of the house at *Weston Green*, and not to the other real estates. Besides, as I intimated at the time of the argument, the title of the devisees as between them and the heir, is not in question in this cause. If they have not a good title against the heir, then he has an adverse legal title, which he may assert by ejectment. On this point I entertained no doubt.

There were, however, two other points; (that is to say) first, what was the effect of the erasures, alterations and interlineations upon the devise of the realty. And, secondly, *Sarah Armstrong* and *Isabella* her daughter having died without exercising the power of appointment given, to the survivor, over one-fourth of the trust property, did that fourth become part of the residue given to the other residuary legatees?

1851.

SIMMONS

v.

RUDALL.

With respect to the first of these points, the first matter to be considered is as to the interlineations; when were they made? If made before the execution of the will, the substituted parties would take: if made afterwards, there would be no devise to them valid according to the Statute of Frauds. With a view to the determination of this point, I requested to be informed when *Mary Anne Bradley*, whose name is substituted for that of *Rose*, was born; for, if her birth had been subsequent to the execution of the will, it would, of course, have followed, as a necessary consequence, that the substitution of her name must have been subsequent to that execution. It turns out, however, according to the information furnished to me, a few days before the end of last term, that *Mary Anne Bradley* was born in or before the year 1805; so that the date of her birth does not necessarily prove when the alteration was made: I am, therefore, obliged to recur to general principles, and to decide what is the legal presumption as to an interlineation, when there is no evidence, internal or external, to show whether it was made before or after the execution of the will.

In the case of deeds, the authorities seem to show that, when there are interlineations, the presumption is that they were made before execution. See Mr. Butler's note 136, to Co. Litt. 225 b; also Vin. Abr. *Faits*, U. 10, and some cases referred to, in Phillipp's on Evidence, note 3, p. 470, 8th edit. And this is consistent with good sense: for every deed expresses the mind of the parties at the time of its execution; and so, to alter it afterwards, would be fraudulent, and, in many cases, highly criminal. The presumption, therefore, is that no alteration has been made. But, in the case of wills, this reasoning does not apply. A will is intended to indicate the mind of the testator at the moment of his

death; and so it is, in the language of the law, ambulatory, and may well, consistently with its object, be altered from time to time as often as the mind or wishes of the testator are changed. It is, therefore, plain that, in the case of a will, the reasons for presuming every interlineation to have preceded the execution, which prevail in the case of deeds, do not exist. In a recent case before the Privy Council, *Cooper v. Brockett (m)*, the Judicial Committee decided, in a case where there were interlineations but no proof as to when they were made, that probate must be granted of the will as it stood before the making of the interlineations. Their Lordships held that they could not presume them to have been made before the will was executed. This decision proceeded on the 21st clause in the last Will Act, 1 Vict. c. 26, which enacts (*inter alia*) that no interlineation made in any will after the execution thereof, shall have any effect, unless the alteration shall be executed in the manner required for the execution of the will. The effect of this clause, is to put an interlineation, as to a bequest of personalty, on the same footing on which an interlineation as to realty stood before the Statute; and the decision, therefore, of the Judicial Committee, though relating, of course, to personal estate only, furnishes an authority the principle of which is applicable to every will whether of real or personal estate. By that authority, I should have felt bound, even if I had not agreed with the reasoning on which it proceeded. But it seems to me to be founded on the strictest principles of law and good sense: and, acting on it, I must consider the insertion of the names of *Mary Anne Bradley* and *Maria Cutting* to have been made after the date of the will, and so to be inoperative as to the real estate.

(m) 4 Moore's Privy Council Cases, 449.

1851.
SIMMONS
v.
RUDALL.

1850.

SIMMONS

v.

RUDALL.

It remains to consider what is the effect of the erasure of the name of *Rose Bradley*. I think it had no effect at all. In the first place, I have no difficulty in coming to the conclusion, as matter of fact, that the erasure of the name of *Rose*, and the interlineation of that of *Mary Anne*, were contemporaneous acts. If the erasure of *Rose's* name was made, as possibly it might have been made, in her lifetime, it was clearly made only for the purpose of substituting the name of *Mary Anne*; and, as that object could not be carried into effect, the original intention in favour of *Rose*, must be deemed to continue unchanged. On the other hand, if (as was possibly the case) the name was erased after her death and because she had died, then I think the mere erasure of her name would show no more than that the testator was aware of her death, and so that the provision he had made to take effect on that event, namely, the gift over of her share to *John Simmons* and *Katherine Cutting*, would come in operation; and, at all events, no effect was meant to be given to the act of erasure, unless, at the same time, effect could be given to the insertion of the name of *Mary Anne*. For these reasons I think that, in the events which happened, *John Simmons* and the Defendant *Katherine Cutting*, became entitled, on the death of *Isabella Cutting*, in the will called *Isabella* the daughter of *Sarah Armstrong*, in equal moieties, to three-fourths of the real estate devised to the trustees.

A doubt occurred to me, on looking at the will, whether *John Simmons* and Mrs. *Rudall* took more than life interests in *Rose's* third, for the want of words of inheritance in the gift over; but I think that that doubt is unfounded. The language of the gift over, so far as relates to the realty, is, upon trust to convey the share

of her so dying (that is to say of *Rose*) equally among the survivors, share and share alike, together with their original shares of the real estate. What the trustees are to convey, is the share of *Rose*: share in what? I think, clearly, by the context, her share of the real estate; and these words are sufficient to carry the fee simple.

1851.
SIMMONS
v.
RUDALL.

The only remaining question is as to the one-fourth of the real and personal estate over which *Isabella Cutting* had a power of appointment which she did not exercise. On behalf of the devisees of the other three-fourths, it was argued that it passed to them under the words, "all the rest, residue," &c. But I think this is not a legitimate construction of the language used. The testator subjects one-fourth of his estate, real and personal, to the appointment of the survivor of the tenants for life; and then gives the rest and residue, after their deaths, to others. The words are as follows: "And upon further trust to divide, convey, assign and transfer all the rest, residue and remainder of the said trust-monies and real estate." I think this passage must be read as if the words had been all the real and personal estate except the one-fourth subjected to the appointment of *Sarah Armstrong* and her daughter. The consequence is that, as to one-fourth, there is an intestacy, and *Thomas Williams*, who the *Master* has found to be now the heir-at-law and the personal representative of the sole next-of-kin, of the testator, will be entitled to that fourth.

1850 :
18th Dec.

*Joint-stock
Companies'
Winding-up
Acts.
Costs.*

IN THE WINDING UP OF THE NARBOROUGH AND WATLINGTON RAILWAY COMPANY.

EX PARTE JOHN JAMES.

A petition praying either that a Company might be wound up, or that a preliminary inquiry might be directed as to the expediency of winding it up, was dismissed, as having been presented without sufficient ground; and the petitioner was ordered to pay the respondent's costs, although the respondent was not liable as a contributory, nor had been served with the petition, but appeared voluntarily.

THE petition stated that, in September 1845, an association, joint-stock company or partnership was projected and provisionally registered under the title of *The Wolverhampton, Walsall, Leicester, Peterborough, Norwich and Yarmouth Junction Railway Company*; and, thereupon, an association, or joint-stock company was formed for the purpose of obtaining, by Act of Parliament, power to make the railway: that a very great number of shares in the undertaking, were applied for by the public: that the petitioner was one of the provisional directors of the Company, and, as such, a member or contributory thereof: that, in November 1845, the committee of management of the intended Company, of which the petitioner was a member, determined to confine their operations to a certain portion of the line: that considerable expense was incurred in the formation of the said Company and otherwise in relation thereto and the said projected undertaking, before the registration of the Company next after mentioned, and also in endeavouring to wind up the affairs of the said Company:* that, in November 1845, the project for making such portion of the last-mentioned railway as aforesaid, was provisionally registered under a title men-

* The above statement of the petition was correctly taken from the brief.

tioned in the petition, and, in January 1846, under the altered title of *The Narborough and Watlington Railway Company*: that none of the allottees paid the deposits on the shares allotted to them; and therefore the standing orders of Parliament could not be complied with; and, thereupon, it became impossible, for the Company, to take the necessary steps towards applying, to Parliament, for an Act to authorize their undertaking; and, in consequence thereof, the Company had become wholly abortive and the undertaking had been abandoned, and the Company had ceased to carry on any business whatever: that expenses to a considerable amount, had been incurred in and about the matters aforesaid; and various sums of money had been contributed, by the petitioner and various other members of the Company, towards the discharge of the debts and liabilities thereof; but the amount so contributed, was wholly insufficient to discharge such debts and liabilities; *and that there were many outstanding debts and liabilities of the Company to a considerable amount, in respect of which the petitioner, or any other contributory, was liable to be sued by the creditors of the Company.* The petition prayed that the Company might be absolutely dissolved and wound up; and for a reference, to the *Master*, to wind it up, or to make preliminary inquiries as to the propriety, necessity or expediency of dissolving it and winding it up.

1850.

EX PARTE
JAMES.

The Honourable *Henry William Wilson* made an affidavit, in opposition to the petition, by which he deposed that, in the year 1845, he was induced, by *Joseph Green James*, a solicitor residing at *Walsall*, to allow his name to be placed upon the provisional committee of the railway company: that the scheme became abortive and was abandoned, and he had to pay various sums of money in liquidation of claims made against

1850.

EX PARTE
JAMES.

him, in respect of the intended railway: that a committee was appointed to investigate the affairs of the Company, and to discharge such liabilities as might be found justly due: that, in common with some other members of the provisional committee, he paid 76*l.* 10*s.*, as his share, towards the liquidation of such expenses; and he believed that the amount so received by the committee, was properly applied in discharging the liabilities of the Company: *that this took place so far back as the year 1846, since which time he had had no claims, whatever, made upon him in respect of the railway, save by Joseph Green James himself, who brought an action against him for the recovery of his bill of costs amounting to 2106*l.* 4*s.* 1*d.*, put him to great expense in preparing to oppose the same, and, on the trial of the cause, without any previous intimation whatever, abandoned his claim for his bill of costs, and confined his demand to the sum of 616*l.*, as a payment made to the engineer of the Company: that the deponent obtained a verdict against Joseph Green James, but the taxed costs of the action were not yet paid, owing to the alleged poverty of Joseph Green James: that, in addition to the taxed costs, the deponent had incurred heavy expenses through the conduct of Joseph Green James, and he considered that the petition was but another scheme for extorting more money from him and others: that the petitioner was brother to Joseph Green James: that the deponent was not aware that there was a single bonâ fide claim outstanding against the Company, the committee, appointed to investigate the affairs of the Company, having invited all persons having claims, to send them in, and all claims so sent in having been fully discharged by the committee; and the deponent believed that there was no reason whatever for winding up the affairs of the Company under the provisions of the Winding-up Acts, save*

as affording *Joseph Green James* another opportunity of attempting to recover his bill, or, in default, of putting money into his pocket, in the shape of expenses for winding up a Company wound up and settled nearly four years ago.

1850.
EX PARTE
JAMES.

Other affidavits were made in opposition to the petition, from which it appeared that *Joseph Green James* was not only the brother, *but also the solicitor of the petitioner*, in the petition: that, in August 1849, he wrote two letters to Mr. *Wilson's* solicitor, stating that a petition had been drawn and would be presented on the first petition-day, for winding up the affairs of the Company, and that he was informed that he should be able to obtain the whole amount paid by him to engineers and others, from the allottees; and that the Winding-up Act would bring all to book. It further appeared, from the affidavits, that, in October 1845, *Joseph Green James* signed and distributed a printed paper, by which he, as solicitor to the railway, undertook and declared that he would not call upon, require or expect any promoter, provisional or permanent director, or member of the provisional committee, or then or future shareholder of the railway, to be or become, personally or individually, liable or chargeable for any salary, cost, charge, matter or thing whatever that might be or had been done by him or by his direction; and that he would look, solely and entirely, to the funds of the Company and to the shares which should be subscribed for or contracted to be purchased, for payment of any salary, cost, charge or account duly incurred, by him, for the purposes of the Company.

The petitioner stated, in an affidavit in reply, that he believed that there were outstanding liabilities against

1850.

EX PARTE
JAMES.

the Company to the amount of 1000*l.* and upwards, and, amongst them, 78*l.* due to the parliamentary agent to the Company : 20*l.* due to certain printers for printing prospectuses for the Company ; and divers sums amounting, in the whole, to 70*l.* and upwards for advertising and goods sold and delivered to the Company. Another affidavit in reply, was made by *Joseph Green James*, stating that he had examined the books of the Company, and that he did not find that Mr. *Wilson* ever applied for or had any shares in the Company allotted to him.

The petition now came on to be heard.

Mr. *Rolt* and Mr. *W. Morris*, in support of it, said that an amount of liabilities outstanding against the Company, was sworn to, and that the petitioner was liable to be sued in respect of some of them, and, therefore, he was entitled to the usual order for winding up the affairs of the Company. And they objected to Mr. *Wilson* being heard in opposition to the petition, because he was not a contributory to the Company, nor had he been served with the petition, but appeared upon it, in consequence of its having been advertised, in the *London Gazette*, pursuant to the tenth section of the Winding-up Act of 1848, 11 & 12 Vict. c. 45. They cited *Roberts's case* (a), *Besley's case* (b), *Ex parte Cooke* (c), and *Ex parte Holinsworth* (d).

Mr. *Malins* and Mr. *De Gex*, for Mr. *Wilson*, said that the petition was, in fact, the petition of *Joseph*

(a) 2 Hall & Twells, 391, (c) 3 De Gex & Smale,
and 2 Macn. & Gord. 192. 148.

(b) 2 Hall & Twells, 375, (d) *Ibid.* 7.
and 2 Macn. & Gord. 176.

Green James, and the object of it was to obtain, from the members of the Company, the payment of certain debts for which he was liable and against which he had indemnified them by his guarantee : that the petitioner did not allege that any action or suit had been commenced or was intended to be commenced against him ; and, indeed, that no liabilities whatever existed against the Company : but all the just demands against it had been liquidated by the payments made by Mr. *Wilson* and others : that those payments were made for the sake of peace, and were not an admission of liability on their parts : that, in the present uncertain state of the law on the subject, Mr. *Wilson* might be held to be a contributory in the *Master's* office ; and, therefore, he was entitled to appear and oppose the petition : *Ex parte Pocock* (e), *Ex parte Murrell* (f).

1850.
EX PARTE
JAMES.

Mr. *Morris*, in reply, said that there might be demands against the Company, to which the guarantee did not extend, and that there might be persons liable to the demands to which it did extend.

THE VICE-CHANCELLOR :

I think that this is a case in which I ought not to make any order.

If the matter were *res integra* and I were not bound by any authority, I should not, as at present advised, make any order in any case where a body of persons have associated themselves together to form a Company which, ultimately, turns out to be abortive ; and, speaking with all due deference, I think the extent of evil which orders in such cases have produced, has not yet

(e) 1 De Gex & Smale, 731.

(f) 3 De Gex & Smale, 4.

1850.

EX PARTE
JAMES.

been fully considered. What is here called a Company, is the body of promoters of the Company. The transactions of such a body of persons, are not entire as in the case of a partnership, but rather a series of transactions affecting only the parties severally acting therein, and for which the members of the body are, so to say, liable piecemeal. It does not follow, because a number of persons associate to form a Company, that all of them are liable to contribute: the very contrary has been decided in a Court of law. The members of such a body are not partners, nor are they agents for each other, with respect to all matters properly done for the formation of the Company. Each, in law, is liable for those acts which he has expressly or impliedly authorized. Therefore it may be that *A.*, *B.* and *C.* are liable to the engineer; *D.*, *E.* and *F.*, to the parliamentary agent; *G.* and *H.*, to the advertising agent; and so on. The difficulties will be endless in doing justice to all parties, when you come to make the necessary calls to liquidate the debts in those cases in which orders of reference have been made. It is, however, now too late to contend that these associations for the formation of a Company, are not within the terms of the Winding-up Acts. But, though they have been decided to be within the principle of the Winding-up Acts, yet I must say, when a case is presented which you are asked to bring within the operation of the Acts, it is a matter of discretion to pronounce the order of reference, or not: and, where that discretion is to be exercised, the inconvenience to arise out of such a reference is a circumstance not to be disregarded. I do not set up my judgment against the decisions which have been already pronounced. I concur, entirely, in the observations that have been made by *Vice-Chancellor Knight Bruce*, on whose experience I am most happy to rely, that orders, heretofore, have been, per-

haps, too hastily made; and that the Court is bound to see whether it is expedient that such orders should be granted before they are made.

1850.
EX PARTE
JAMES.

Now, looking at the circumstances of this case with this feeling in my mind, I cannot help seeing that it is one in which the order ought not to be made. If I were to make the order, it would lead to great expense and litigation, and no man can tell where it would end.

What is this case? The Petitioner is clearly acting to favour his brother, the solicitor to the Company. On the formation of the scheme, the solicitor said; "Gentlemen, form yourselves into a provisional committee, and I will not hold you personally liable for my costs and expenses; but I will look to the funds to arise from subscriptions." Relying on that undertaking, parties came forward and concurred in acts which, but for that indemnity, they would not have concurred in. All that the Petitioner has shown as a foundation for the petition, is that he was, formerly, on the provisional committee. That, however, as Mr. *Malins* contended, is not sufficient to make him liable as a contributory; and it does not appear, from the petition, that he acted, in other respects, so as to make himself liable for anything. It is very true, that, two or three months after the scheme had proved abortive, the Respondent and others, who termed themselves members of the committee, went to a meeting, and subscribed a certain sum per head, *causâ pacis*, being told that there their liability would end. But I am of opinion that that act cannot be held, in a court of justice, to amount to an admission of liability by those parties. All that can be inferred from it, is that the parties imagined, at the time, that they were open to attack by suit, and that it was better

1850.

EX PARTE
JAMES.

to pay down a certain sum, than to be kept in trouble. The allegation too is that all this happened some four or five years since. The Petitioner says that the liabilities of the association amount to 1000*l*. This, however, is made out only to the extent of 168*l*., exclusive of his brother's costs and expenses: and, in this 168*l*., are included certain items of charge in respect of parliamentary agency and advertising, which are, in effect, costs incurred by the solicitor who employed the parties, and are costs covered by the guarantee. The solicitor, after having failed in an action for his costs, threatened, in August 1849, to bring the whole matter into the *Master's* office: and now this petition is presented, by his brother, upon a loose allegation of liability to outstanding debts. Under all the circumstances of the case, the petition appears to me to be without foundation; and it must, therefore, be dismissed with costs.

Mr. Morris.—As the Respondent has not been served with the petition, but has appeared voluntarily, and as he cannot be held to be a contributory because he was only a provisional committeeman, he has no right to appear, or, at all events, ought not to have his costs; and *Vice-Chancellor Knight Bruce* has never given costs in a similar case.

Mr. De Gex.—In the present uncertain state of the authorities, the Respondent might have been placed on the list of contributories; which would have occasioned him both trouble and expense; and therefore he was quite justified in appearing and opposing the petition, although he has not been served with it.

The Vice-Chancellor.—If *Vice-Chancellor Knight*

Bruce is not in the habit of giving costs in a case like the present, I cannot go along with him.

1850.

EX PARTE
JAMES.

In an administration suit, where the language of the will is ambiguous, the costs of the suit are always ordered to be paid out of the estate, because the costs were occasioned by the testator. Here, who occasioned the costs? Why the Petitioner: and, as I am of opinion that the petition was presented without sufficient ground, I think that he must pay the costs of having placed himself in a situation in which he does not succeed.

Petition dismissed with costs.

HAWKINS v. GATHERCOLE.

1850:
7th December:
and
1851:
11th January.

*Production of
documents.
Privileged
communications.*

IN June 1845, the Defendant *Gathercole* purchased the advowson of *Chatteris Nuns*; and, in August following, mortgaged it to the Plaintiff, for 24,500*l.* *G. R. Dodd*, a Co-defendant, was *Gathercole's* solicitor in both those transactions; and he was also the Plaintiff's solicitor in the mortgage.

A. purchased an advowson in June 1845, and, in August following, mortgaged it to *B.* In 1850 *B.* filed a bill, against *A.* and the solicitor employed by him in the purchase and the mortgage, for a sale of the advowson, alleging that the mortgage was an insufficient security; and that he was induced to lend his money upon it, by misrepresentations made to him, by *A.* and his solicitor, as to the value of the advowson. *A.*, in his answer, denied the alleged fraud; but admitted that he had in his possession letters which had passed, between him and his solicitor, in reference to the purchase and the mortgage, and added that they were confidential communications made to him by his solicitor in that character, and therefore, were privileged; but he did not state that any of them contained legal advice or opinions, or were written *post litem motam*.

The Court ordered him to produce all the letters.

The bill, which was filed in January 1850, alleged that the mortgage was an insufficient security for the 24,500*l.*; and that *Gathercole* and *Dodd*, combining and colluding with each other, misrepresented the value of the advowson and induced the Plaintiff to lend his money upon the security of it, although they well knew that it was an insufficient security. The bill charged that the Defendants had, in their possession, divers letters and other papers and writings referring to and showing the truth of the matters therein stated and charged, or some of them. It prayed for an account of what was due on the mortgage; that the advowson might be sold, and the proceeds paid, to the Plaintiff, in part satisfaction of his debt, and that the balance might be paid, to him, by *Gathercole* and *Dodd*, together with the costs of the suit.

Gathercole said, in his answer, that various communications in writing had passed, between him and *Dodd*, in relation to procuring an advance of money upon the security of the advowson, and, particularly, in respect to the mortgage transaction between him and the Plaintiff, in respect to obtaining an advance from the Plaintiff, or as to the nature or value of the said security, or of some other nature relative to the matters in the bill contained; but he denied that it would appear, from such communications, that he and *Dodd*, or either of them, were aware of the inadequacy or insufficiency of the security, or that the fraud practised, by them, upon the Plaintiff, would thereby appear, because no such fraud was ever practised: that he had, in the first schedule thereto, set forth a list of the letters which had passed, between him and *Dodd*, in reference to the purchase of the advowson and the subsequent mortgage thereof to the Plaintiff, which were then in his possession or power: *that all the said letters were confidential communications made to him, by Dodd, in his character as his solicitor; and he submitted that the said letters were privileged communications, and that he ought not to be called upon or required, by the Plaintiff, to produce the same.*

1850.
 HAWKINS
 v.
 GATHERCOLE.

Mr. *Bethell* and Mr. *Sidney Smith*, for the Plaintiff, now moved for the production of the letters, which they said related to the Plaintiff's title, or, at all events, to a title which was common to him and the Defendant, and that they were not communications made with regard to or in contemplation of any dispute between them.

Mr. *Roxburgh*, for *Gathercole*, said that the letters were sworn to have passed between *Dodd* and *Gathercole*, in the character of solicitor and client; and that

1850.
 {
 HAWKINS
 v.
 GATHERCOLE.

Herring v. Cloberry (a) decided that all communications which took place between persons in those characters, were privileged, although they did not relate to litigation contemplated or commenced.

Mr. *Bethell*, in reply, said that *Herring v. Cloberry* had been cited without regard to the facts of the case ; that, there, the Plaintiff sought to impeach the title of the Defendants ; and, as no one could be compelled to produce his title, so no one could be compelled to furnish evidence, to attack his title, out of communications between him and his solicitor in relation to that title ; but, in the present case, no attempt was made to impeach *Gathercole's* title ; that the Plaintiff had become the owner of the property which *Gathercole* had purchased ; and his title was the Plaintiff's title, and the communications which he was called upon to produce, related to that title.

1851 :
 {
 11th January.

The VICE-CHANCELLOR :

The bill, in this case, was filed by a gentleman named *Hawkins*, against the Rev. *M. A. Gathercole*, and *G. R. Dodd*, a solicitor, and certain other persons, for the sale of the advowson of *Chatteris Nuns*, which *Gathercole* purchased in June 1845, and mortgaged, shortly afterwards, to the Plaintiff. The bill charges *Dodd* with having, in collusion with *Gathercole*, represented the advowson to be of greater value than it really was, and, thereby, induced the Plaintiff to lend his money upon an insufficient security : and it seeks to make *Gathercole* answerable for the deficiency, and answerable, jointly with *Dodd*, for the costs of the suit. *Dodd* was

(a) 1 Phill. 91.

Mr. *Gathercole's* solicitor in the purchase as well as in the mortgage, and, of course, much correspondence must have passed between them during and relative to those transactions: and *Gathercole*, being called upon, by the bill, to produce documents in his possession relating to the matters contained therein, says, in his answer, that he has set forth, in the first schedule thereto, a list of the letters in his possession, which passed, between him and *Dodd*, in reference to the purchase of the advowson and the subsequent mortgage of it to the Plaintiff; and adds that all those letters were confidential communications made, to him, by *Dodd*, in his character as his solicitor; and he submits that they are privileged communications, and that he ought not to be called upon, by the Plaintiff, to produce the same.

1850.
 HAWKINS
 v.
 GATHERCOLE.

I think that, in this case, I am relieved from the necessity of entering, at any length, into the question whether these documents ought to be produced or not; for it seems to me that this is the very point decided, by *Vice-Chancellor Wigram*, in *Lord Walsingham v. Goodricke* (a). What took place, there, was that negotiations were commenced, in 1841, between persons professing to be the agents of the parties, for the sale of an estate, belonging to Sir *Harry Goodricke*, to Lord *Walsingham*. Those negotiations were continued until January 1842, when the price was settled so far as the persons professing to act as agents, could settle it; and instructions were given by Lord *Walsingham's* agents, to Messrs. *Boodle and Co.*, who, I presume, were his Lordship's solicitors, to prepare an agreement for the signature of the parties. The draft of an agreement was prepared accordingly, by Messrs. *Boodle*: and they

(b) 3 Hare, 122.

1850.

HAWKINS

v.

GATHERCOLE.

handed it to Sir *Harry*, who placed it in the hands of his solicitor, Mr. *Murray*; and *Murray* laid the abstracts of title before Counsel, with a view to the introduction of such special conditions into the agreement, as the circumstances of the title might require. On the 17th of October 1842, Mr. *Murray* informed Messrs. *Boodle*, that Sir *H. Goodricke* did not intend to sell the estate, and that he was directed to take no further steps in the matter. Upon which Lord *Walsingham* wrote to Sir *H. Goodricke*, and intimated that he should use every means in his power to enforce the contract; and, in January 1843, he filed a bill for that purpose. Sir *H. Goodricke* set forth, in a schedule to his answer, a list of the letters in his possession, relating to the matters mentioned in the bill; but said that they were written to him by *Murray* as his solicitor and confidential adviser, and insisted that he was not bound to produce them. On the coming in of the answer, the Plaintiff moved for the production of the letters, mentioned in the schedule, which had passed between Sir *H. Goodricke* and Mr. *Murray* in and prior to the month of July 1842; which was prior to the time when the dispute between the parties arose. And *Vice-Chancellor Wigram* ordered the production of all those letters, except such of them as Sir *H.* should state, by affidavit, to contain legal advice or opinions. In this case, it is not alleged that any of the letters specified in the schedule, were written after the dispute between *Hawkins* and *Gathercole* arose, nor is it alleged that any of them contain legal advice or opinions; and, therefore, I shall make a general order for the production of them.

Goodall v. Little

GOODALL v. LITTLE.

THE bill was filed by two persons residing in the island of *Teneriffe*, who sued as the syndics or assignees of *Pasley, Little and Co.*, a firm in that island, for an account of consignments and remittances made, by the firm, to *William Little*, one of the members of it who resided in *London*. The bill alleged, amongst other things, that, in 1848, the firm was duly declared bankrupt according to the law of *Teneriffe*, and the Plaintiffs were duly appointed syndics or assignees of the estate and effects of the firm; and that, by virtue of such appointment, all the estate and effects of the firm were vested in the Plaintiffs, for the benefit of the creditors of the firm: that *William Little* had received 4566*l.* on account of the firm, by means of the consignments and remittances; and that he pretended that 4500*l.*, part of that sum, had been attached, in a suit instituted in the Court of the Lord Mayor of *London* by *Archibald*

1850 :
7th December :
and
1851 :
11th January.

*Privileged
communications.
Production of
documents.*

The answer, after denying the title of the Plaintiffs, set forth a schedule of documents in the possession of the Defendants, which it admitted related to the matters mentioned in the bill; but it denied that, by those docu-

ments, the truth of such matters would appear to be otherwise than as stated in the answer; and it submitted that the Defendants ought not to be ordered to produce the documents, and, in addition, that certain of the letters mentioned in the schedule, ought not to be produced in this or any other suit, inasmuch as they were written either pending or in contemplation of the litigation in this suit, and with reference to the matters in this suit brought into controversy, and were written to one of the Defendants from his solicitor, or from an attorney who had been employed by him in a suit instituted by him in the Lord Mayor's Court, to which the bill related, to the solicitors of that Defendant, or from one of the Defendants to another of them, for the purpose of being communicated to the solicitor of the latter, with a view to his defence in this litigation.

Held that such of the first class of letters as were written to the Defendants by their solicitors, in that character merely, were privileged, but that all the other documents and letters ought to be produced.

1850.

GOODALL

v.

LITTLE.

Little, the executor of *Archibald Little* deceased, for a debt due, from *Pasley, Little and Co.*, to the deceased's estate.

The bill charged that the suit in the Lord Mayor's Court, was instituted, not *bond fide*, but in collusion with *William Little*, and to enable him to retain, in his hands, the balance due, from him, to the bankrupt firm ; and that no debt was due, from that firm, to the estate of *Archibald Little*, deceased, but, on the contrary, the estate of *Archibald Little*, deceased, was indebted, to the firm, to a considerable amount in respect of dealings and transactions between him and the firm in his lifetime. The bill further charged that divers letters had been written, by or on the part of *Pasley and Co.* to *William Little*, and by him to the firm, and that he and his Co-defendant *Archibald Little* had, in their custody or power, divers books of account, letters and other documents and writings, relating to the matters aforesaid or some of them, or by which, if produced, the truth thereof would appear.

The answer stated that, according to the law of *Tenerriffe*, no firm of merchants were to be considered as entitled to the privileges of merchants, unless they had registered the partnership-deed of their firm, showing the names of the partners, the term of the partnership and the capital of the firm ; that, according to that law, no person who was not entitled to the privilege and quality of a merchant, could make himself or be declared a bankrupt ; that no deed of partnership was ever registered by *Pasley and Co.* ; that that firm was not, at the time mentioned in the bill or at any other time, duly declared bankrupt ; that, by the same law, no person

could be or be appointed a syndic or assignee of the estate of a bankrupt, unless such person was, himself, both a merchant duly registered and also a creditor of the bankrupt; *that the Plaintiffs were not registered merchants according to the law of Teneriffe, and they had not been nor could they be duly appointed syndics or assignees of the estate and effects of Pasley and Co., or of any bankrupt merchant or firm, nor were the estate and effects, rights and credits of Pasley and Co. vested in them, in any manner; nor was the 4566l. or any other sum, due to them from William Little.* The answer then gave a detailed account of the proceedings in the Lord Mayor's Court, and averred that those proceedings were instituted, *bonâ fide* and not in collusion with *William Little* or to enable him to retain, in his hands, the balance due, from him, to *Pasley and Co.* It admitted that the defendants had, in their possession, the particulars mentioned in the second schedule, and that such particulars *related to the matters mentioned in the bill; but it denied that, by those particulars or any of them, the truth of the matters stated and charged in the bill, or any of them, would appear to be otherwise than as the Defendants had stated in their answer. It denied, also, the title of the Plaintiffs to institute this suit; and submitted that the Defendants ought not to be ordered to produce the said particulars or any of them; and, in addition, that the letters mentioned in the second part of the second schedule, ought not to be produced in this or any other suit, inasmuch as they were all letters written either pending or in contemplation of the litigation in this suit, and with reference to the matters in this suit brought into controversy; and were all letters written either to the Defendant William Little from his solicitors, or from Mr. Ashley, as the attorney of the Defendant Archibald Little in the suit in*

1850.

 GOODALL
 v.
 LITTLE.

1850.

GOODALL

v.

LITTLE.

the Lord Mayor's Court, to Messrs. Oliverson and Co., as the solicitors of Archibald Little, or from the Defendant James Little, (who was another member of the firm of Pasley and Co., and carried on the business of the firm in Teneriffe) to the Defendant William Little, for the purpose of being communicated to the solicitors of William Little, with a view to William Little's defence in this litigation.

A motion was now made, on behalf of the Plaintiffs, for the production of all the documents mentioned in the schedule, except the letters dated and written after the filing of the bill.

Mr. *Bethell* and Mr. *Dickinson*, in support of the motion, said that though the Defendants had denied the title of the Plaintiffs, and had denied also that, by the documents mentioned in the schedule to their answer, the truth of the matters stated and charged in the bill, would appear to be otherwise than as they had stated in their answer (which was taking upon themselves to swear as to the judicial construction which would be put on the documents), yet that, as they had admitted that the documents related to the matters mentioned in the bill, they had admitted the relevancy of them; and, therefore, the Plaintiffs were entitled to see them; for a Plaintiff was entitled to see all the documents in the possession of a Defendant, which *might tend* to make out his title, and the Court, and not the Defendants, was to determine as to the effect of them. With respect to the letters mentioned in the second part of the schedule, they observed that letters passing between a party and his attorney or solicitor, were not privileged, unless they were written *for the purpose of obtaining professional advice and assistance*; but none of the

letters in question, were alleged to have been written for that purpose; and that letters written by one Defendant to another, were not privileged, although they might have been written for the purpose of being communicated to the solicitor of the other, and with a view to his defence in the suit.

1850.
GOODALL
v.
LITTLE.

They relied on *Edwards v. Jones* (a), and referred to *The Marquis of Bute v. The Glamorganshire Canal Company* (b), *Herring v. Clobery* (c), and *Wigram on Discovery*, third edit. p. 233; and submitted that they were entitled to see all the documents mentioned in the second schedule, except the letters dated after the filing of the bill.

Mr. *Rolt* and Mr. *Cairns*, for the Defendants, said that the answer denied the title of the Plaintiffs as stated in the bill, and also that the documents mentioned in the schedule, would prove it; *Adams v. Fisher* (d): and that, with respect to the letters mentioned in the second schedule, the answer stated what, alone, would have been sufficient to protect them; namely, that the first class of them was written either pending or in contemplation of the litigation in this suit and with reference to the matters in this suit brought into controversy, either to *William Little* from his solicitor, or from Mr. *Ashley*, the attorney of *Archibald Little* in the Lord Mayor's Court, to *Archibald's* solicitors; and that the second class was written by *James Little* to *William*, for the purpose of being communicated to *William's* solicitors with a view to his defence in this litigation; *Lancaster v. Evors* (e).

(a) 1 Phill. 501.

(b) *Ibid.* 681..

(c) *Ibid.* 91.

(d) 3 Myl. & Cr. 526.

(e) 1 Phill. 349.

1850.

GOODALL

v.

LITTLE.

1851 :
11th January.Mr. *Bethell* replied.

The VICE-CHANCELLOR :

The Plaintiffs filed this bill as assignees, in *Teneriffe*, of *James* and *William Little*, who traded there, under the firm of *Pasley, Little and Co.*, and who had, as the Plaintiffs allege, become bankrupt according to the laws there in force. The Defendants are *James* and *William Little*, and also *Archibald Little*. The bill states that the firm in *Teneriffe* was managed there by *James Little*; and that he consigned goods and remitted bills of exchange to *William Little* in *London*, to be realized on account of the *Teneriffe* firm: and that *William*, accordingly, did realize money, from such goods and bills, to the amount of 4500*l.* and upwards: but that, in order to prevent the *Teneriffe* firm, or the Plaintiffs as their assignees, from obtaining that money, the defendant, *Archibald Little*, in collusion with his brother, *William Little*, instituted a fraudulent suit, in the Court of the Lord Mayor of *London*, in which he caused the money in the hands of *William*, due to the *Teneriffe* firm, to be attached for a large debt alleged to be due, to the estate of his late father, from that firm: and the object of the present suit is to obtain payment of the money realized by *William Little*, notwithstanding the proceedings in the Lord Mayor's Court. The Defendants *William* and *Archibald Little* have put in a joint answer, in which they wholly deny the Plaintiffs' title as assignees, and insist on the proceedings in the Lord Mayor's Court, as good and valid proceedings, instituted and carried on without any fraud or collusion whatever: and, in answer to the usual interrogatory as to their possession of papers and documents, they say that they have, in their possession, the particulars mentioned in the second schedule to this their answer annexed, and which particulars relate to the matters in the bill mentioned,

but they deny that, by the said particulars or any of them, the truth of the matters in the said bill stated and charged, or any of them, would appear to be otherwise than as herein stated; and they submit that they ought not to be ordered to produce the said particulars or any of them: and they submit, in addition, that the letters mentioned in the second part of the said second schedule, ought not to be produced in this or any other suit; inasmuch as they are all letters written either pending or in contemplation of the litigation in this suit, with reference to the matters in this suit brought into controversy, and are all letters written either to this Defendant, *William Little*, from his solicitors, or from the said Mr. *Ashley*, as such attorney as aforesaid, to Messrs. *Oliver-son and Co.* as solicitors of this other Defendant *Archibald Little*, or from the said *James Little* to this Defendant *William Little*, for the purpose of being communicated to the said solicitors of this Defendant *William Little*, with a view to the defence of this Defendant, *William Little*, in this litigation.

1850.
GOODALL
v.
LITTLE.

Mr. *Bethell* moved, on this answer, for the production of all the letters and documents mentioned in the schedule. The motion was resisted on two grounds: First, because the Plaintiffs' title was denied; and, secondly, because the documents in question were within the ordinary rule of privileged communications.

With respect to the first objection, I am, clearly, of opinion it is entitled to no weight. The Plaintiffs assert a title which the Defendants deny. The Defendants admit that they have, in their possession, documents relating to the matters in the bill mentioned. Some of the matters in the bill mentioned, are the facts from which the Plaintiffs show, or allege they show a title. The do-

1850.

GOODALL

v.

LITTLE.

cuments in question relate, or, for anything that appears in the answer, may relate to those very facts. The Defendants, it is true, say that the documents would not show the facts to be as the Plaintiffs allege them to be. But that is the very point in issue. The documents relate to the point. What is the true result of them, is the matter to be decided. It may be true, as stated by the answer, that, by the documents, that is, by them alone, the truth of the Plaintiffs' case would not appear. But they may form material links in the chain of proof; and, at all events, as it is admitted that they relate to the matters in dispute, the Plaintiffs, unless there be some other objection, are entitled to see them in order to form their own opinion as to whether they do or do not make out, or help to make out their title.

On the other question, that is, whether the Defendants are entitled to withhold production on the ground of the documents being privileged, I shall act on the doctrine laid down by Lord *Lyndhurst* in *Hughes v. Bidulph* (g). There, in answer to a motion for production of documents, an affidavit was made, by the Defendant, that many of the papers and letters were communications which had passed between her and her country solicitor, Mr. *Douglas*, or her town solicitor, Mr. *Williams*, or between Mr. *Douglas* and Mr. *Williams*. Upon a motion for production, Lord *Lyndhurst* stated his opinion to be that confidential communications between the Defendant and her solicitor or between the country solicitor and the town solicitor, made, in their relation of client and solicitor, either during the Cause or with reference to it though previous to its commencement, ought to be protected: and, accordingly, he made

an order for production of all, except such as the Defendant should, by affidavit, bring within such exception. Now, in order to apply the rule so laid down to the present case, it is to be observed that, here, the letters were all written either pending or in contemplation of the litigation in this suit, and with reference to the matters brought into controversy in this suit. This, clearly, brings them within the rule of privilege, so far as their subject-matter is concerned: and then the only question is whether they passed between parties and under circumstances to which the privilege is applicable. And, in order to decide this, it is necessary to class them. First, there are letters to the Defendant, *William*, from his solicitor: secondly, letters from *Ashley*, the attorney in the Lord Mayor's Court, to *Oliverson and Co.*, the solicitors of *Archibald*: and, thirdly, there are letters from *James*, who was in the island of *Teneriffe*, to *William*, written for the purpose of their being communicated to the solicitor of the Defendant *William*, with a view to his defence. With respect to the two last classes, there is no difficulty. The second class is, certainly, protected. If letters between the town and country solicitors are protected, so also must letters passing between the solicitor and an attorney acting within a local jurisdiction, such as is the Lord Mayor's Court, and employed, for that purpose, by the solicitor: there is no distinction, in principle, between the two cases. It is equally clear that the third class is not protected. The letters in that class are letters from one Co-defendant to another; and it is quite unimportant that they were written with a view to enable the party to whom they were addressed, to consult his solicitor upon them. That which might pass, between *William* and his solicitor, on the subject of those letters, would be protected. But there is no protection as to letters passing

1850.

GOODALL

v.

LITTLE.

1850.

GOODALL

v.

LITTLE.

between parties themselves, or from a stranger to a party, merely because such letters may have been written in order to enable the person to whom they are sent, to communicate them, in professional confidence, to his solicitor.

This case is clearly distinguishable from *Steele v. Stewart* (b); where Lord *Lyndhurst* held that letters sent, from *India* to the Defendant, in order to be laid before his solicitors, were protected. That decision proceeded on the ground that the person who wrote the letters, was an agent of the solicitors, sent out to procure evidence; and his letters were, therefore, in the same position as letters from the solicitors themselves would have been in.

With respect to the letters in the first class, that is, letters written to *William* from his solicitors, they are protected if written by them merely in their character of solicitors. The answer does not, in terms, state this to have been the case; though I cannot but suppose that that is what was intended to be expressed: and, therefore, as to the letters to *William* from his solicitors, I shall follow the course adopted, by Lord *Lyndhurst*, in *Hughes v. Biddulph*; that is, I shall order the production of them except such as the Defendant *William Little* shall state, on his oath, to have been written to him by his solicitors merely as his solicitors.

(b) 1 Phill. 471.

IN THE MATTER OF THE JOINT-STOCK COM-
PANIES WINDING-UP ACTS, AND OF

THE SHERWOOD LOAN-COMPANY,

EX PARTE JAMES SMITH.

THE *Sherwood* Loan Company was formed in September 1843, by the Petitioner and more than fifty other persons, for the purpose of raising 20,000*l.*, or thereabouts, with the intention of afterwards lending the same, to some of the other parties, at interest at 5*l. per cent. per annum*, under certain rules and regulations,* which prescribed (amongst other things) that the Company should hold monthly meetings: that six persons, whose names were mentioned, should be a committee and meet, on a certain day after every meeting of the company, to conduct the business of the Company which should not be transacted at the general meetings, and should approve or disapprove of the sureties or securities proposed, by the members of the Company, for securing the money which should have been allotted to them, on loan, out of the fund or stock of the Company, and should appoint two members of the Company to be trustees, in whose names, or in the names of such other persons as the committee should appoint, all mortgages or securities to the Company were to be taken: that the committee should also appoint a treasurer and a secretary; the former of whom was to receive all monthly and

1850:
10th December:
and
1851:
11th January.

*Joint-stock
companies
winding-up
Acts.
Loan society.*

A loan society
held to be with-
in the Winding-
up Act, 1849.

* These rules and regulations, as will be seen on perusing them, were not very intelligible.

1850.
 SHERWOOD
 LOAN
 COMPANY.

other payments contributed by the members, and dispose of and apply the same as the committee should direct ; and the latter was to attend the meetings of the Company and committee, and record their resolutions and transactions, and keep accounts of the monthly subscriptions and other payments to be made by members of the society, and of all monies received from any of the members or on their account, at the meetings of the society or otherwise, and of all payments of loans, advances or allotments of money, from the fund or stock of the society, to the members, and of all other payments and outgoings ; and to report, to the committee, whenever any member should be three months in arrear in his payments to the society. That every member of the society, his executors or administrators, should pay, to the treasurer, at every monthly meeting, eight shillings upon every 40*l.* to which he should subscribe ; and, when he should have an allotment of money, upon loan, from the fund or stock of the society, he should also pay the additional subscriptions he should agree to give for the preference of having such loan, by monthly instalments of eight shillings upon every 40*l.* so advanced or allotted to him until the whole of such instalment—subscription* should be paid, together with interest for such loan or sum so advanced, after the rate of 5*l. per cent. per annum.* That every member who should neglect to pay, within the first hour of meeting, his monthly subscription, additional subscription, interest or other payments due from him to the society, should pay the same, to the treasurer, at the next monthly meeting, together with ten shillings per month for every twenty shillings left unpaid, and so on in proportion ; all arrears to be subject to fines in the same proportion, until every member should have received the full amount for which he had subscribed.

* *Sic.*

That, when there should be in hand the sum of 200*l.* or upwards, the same should be disposed of, on loan, under the direction of the committee, at such a price and in such a manner as, in their discretion, should be thought advisable, according to the nature of the security and amount of money advanced; but no member was to have any more money on loan than he subscribed for; and, in case of applications for loans for a greater amount than there should be cash in hand, the committee and trustees were authorized to borrow such sum or sums of money as they might think proper, and to retain any securities belonging to the Company in their hands, as a lien and security, to them, for all sums borrowed or guaranteed. That all monthly and additional subscriptions and interests, and other payments, should be paid to the treasurer, and should constitute and be the fund and stock of the society which was for their mutual and proportionate benefit, and all expenses incurred by the treasurer, the secretary, the committee, the trustees or any other member of the society, in or about the affairs and concerns of the society under the direction and authority of any monthly or special meeting of the committee, should be paid out of the fund or stock; and all checks should be signed by the secretary and one of the committee: That every member of the society who should duly pay his subscriptions according to the rules, his executors, administrators or assigns, should, at all times during the continuance of the society, enjoy a distinct right, share and interest according and in proportion to his monthly subscription under the rules, so that such interest should not only be assignable and transferrable, subject to the rules and regulations, during his lifetime, but, at his decease, belong to or go to his executors, administrators or assigns, and, if requested by them, the society should

1850.
SHERWOOD
LOAN
COMPANY.

1850.
SHERWOOD
LOAN
COMPANY.

take the share or shares, covering all payments and all owing interest from the time the sums should have been paid : That, in case any dispute should arise in the society, or a member should consider himself aggrieved or injured by any of the proceedings under or by virtue of the rules, the question in dispute should be referred to the committee, whose decision should be final : That the Company and the rules, laws and regulations, should remain in full force and effect, and all the members of the society should be thereby bound, until all such members, or their assigns, executors or administrators, should have borrowed and received the whole amount of money for which they should, respectively, have subscribed, and until all arrears, fines and forfeitures in and under any of the rules, should be paid.

The petition, after stating as above, alleged that *Kirke Swann* was duly appointed the treasurer of the Company, and *Thomas Sergeant*, since deceased, and, after his decease, *Thomas Gascoigne*, also since deceased, was appointed the secretary of the Company : That *Swann* and *Thomas North* and *Samuel Parsons* (two of the committee) with *Sergeant* during his lifetime, and, after his decease, with *Gascoigne*, were constant attendants at the committee meetings of the Company, and obtained a preponderating influence over the affairs of the Company, and obtained possession of all the books, documents and securities and the control of the funds belonging thereto : That monthly meetings of the Company were held on the days appointed by the rules, for more than fifty months after the formation of the Company, and the petitioner and most of the other members of the Company paid, to the treasurer, in respect of their shares, the monies payable by them under the rules, which payments amounted to a very considerable sum :

That the petitioner was possessed of five shares in the Company, and had paid, in respect thereof, the sum of 102*l.*; and, with the exception of the sum of 50*l.* which had been advanced to him pursuant to the rules, no sum had been advanced or allotted to him, or been received by him, out of the funds of the Company; and divers other members of the Company who had duly paid, at every monthly meeting, the sum then due from or payable by them, had received no advances or allotments out of the funds of the Company, or any return for the sums so paid by them as aforesaid: That *North, Swann, Parsons, Sargeant, and Gascoigne*, had, respectively, received several sums of money on behalf of the Company, amounting to nearly 2000*l.*, which they, or some one of them still retained and had not accounted for to the Company, nor had the receipts of any of the said sums of money by them or any or either of them, been entered in the books of the Company: That the funds of the Company had been misapplied and misappropriated to a very great extent, and, entirely, through the contrivances of *North, Swann, Parsons, Sargeant, and Gascoigne*: That *North* had possession of the books and securities of the Company, and refused to produce the securities for inspection: That large sums of money had been borrowed, by the Company, and there was still due and owing, by the Company, a large sum of money in respect of the moneys so borrowed: That large sums of money had been advanced, by some of the committee, to other similar loan companies, and also to persons not members of the Company, without the concurrence of the committee, and in contravention of the rules of the Company; and there was still due and owing, to the Company, in respect of such monies so lent and advanced, the sum of 2000*l.* or thereabouts: That the sum of 4000*l.* or thereabouts was due, from divers mem-

1850.
SHERWOOD
LOAN
COMPANY.

1850.
SHERWOOD
LOAN
COMPANY.

bers of the Company, in respect of their shares in the Company, exclusive of the sum of 2000*l.* due and owing from one *William Goddard*, in respect of which sum *North* had received divers sums of money on account, and for which sums he had not accounted to the Company: That the sum of 1956*l.* 6*s.* 5*d.*, or thereabouts, was due, to certain of the members of the Company, for the monies they had respectively contributed in respect of their shares in the Company, exclusively of the shares of the last-mentioned members of and in the profits of the Company: That the sum of 2600*l.* had been advanced, by the committee, to one *John Boot*, one of the members of the Company, on certain securities consisting of title deeds and the joint and several promissory notes of him, *Boot*, and one *Dodsley*, and *North* had, lately and without the consent of the members forming the committee of the Company, agreed to deliver up the securities to *Boot* and *Dodsley*, or to one of them, on the payment to him of the sum of 400*l.* or thereabouts, although there was a much larger sum due, to the Company, from *Boot* and *Dodsley*, amounting to 1700*l.* and upwards: That the last meeting of the Company was held in or about the month of November 1848; and no meeting had since been held; and the petitioner and other members of the Company, were unable to obtain a satisfactory account of the state of the funds of the Company or the application thereof, or to obtain payment of the sums of money due to them respectively in respect of their shares in the Company: *That the business of the Company had altogether ceased*, and the funds thereof ought, after paying the liabilities of the Company, to be distributed between the members according to their several and respective rights and interests: That various questions would arise in the winding-up of the affairs of the Company, which could

only be settled under the provisions of the Winding-up Acts; and the Petitioner had been advised and believed that it would be for the interest of the members of the Company that its affairs should be wound up under the provisions of those Acts; and that it should be declared, by the Court, to be absolutely dissolved. The petition prayed that the Company might be absolutely dissolved and wound up under the provisions of the Winding-up Acts, and for a reference to one of the *Masters* of the Court to wind up its affairs.

1850.
SHERWOOD
LOAN
COMPANY.

Affidavits in support of the petition, were made by the Petitioner and other members of the Company. *North* and *Parsons* made affidavits which negatived, to a considerable extent, the allegations of the petition, and stated that the Petitioner had no longer any interest in the Company, but was a debtor to it in consequence of his not having made payments, which he was bound to make by the rules of the Company.

Mr. *Rolt* and Mr. *Craig* supported the petition.

Mr. *Bethell* and Mr. *Glasse* opposed it. They said, first, that the Company was not an association, company, or partnership, within the meaning of the Winding-up Acts; for it was not a trading or commercial Company, nor did it carry on business for the sake of profit, but it was, in fact, a benefit society, and its dealings were confined to its own members; secondly, that, if the Company was within the meaning of the Winding-up Acts, the Petitioner was not entitled to present the petition, because he had ceased to have any interest in the Company, and, in fact, was no longer a member of it; and, thirdly, that, if the Company was within the Acts and the Petitioner had a right to present the peti-

1850.
 SHERWOOD
 LOAN
 COMPANY.

tion, the case was one in which the Court ought not to make *any order*, or, at all events, ought, in the first instance, to direct the *Master* to inquire and state whether the case was one in which it would be expedient and for the benefit of all parties, to make the order prayed for by the petition. They cited *Ex parte Pocock (a)*, *Ex parte Burge (b)*, and *Ex parte Spackman (c)*.

1851:
 11th January.

The VICE-CHANCELLOR:

This was a petition, under the Winding-up Acts, for an order for the winding-up of the affairs of the *Sherwood Loan Society*. The society was a society established at *Nottingham*, of a somewhat peculiar nature. The shares were to be shares of 40*l.* each, and 8*s.* a month was to be paid, in respect of each share, until the payment in respect of it amounted to 40*l.* The Petitioner was a subscriber for five of those shares; and the way in which the money was to be applied, was this; that, from time to time when the society had got money in hand to the amount of 200*l.* it was to be lent out to the members of the Company; and those who were desirous of obtaining a loan from the Company, were to bid for it, in the same manner as a public loan is bid for; so that there would be a profit coming to the Society from the sums of money that were bid, and also from the interest that was to be paid on the amount of the loan, which was to be 5 *per cent.* Such was the nature of the society, and such was the profit that it was to make. Those who got no loan, would, of course, get an advantage by having had the chance of

(a) 1 De Gex & Smale,
 731.

(b) *Ibid.* 588.

(c) *Ibid.* 599; see also *Ex parte Williams, ante*, 57.

obtaining one, and by having the premiums and interest paid for the loans, divided amongst themselves and the other members of the society.

1851.
SHERWOOD
LOAN
COMPANY.

The affairs of the society went on very regularly up to the year 1848, at which time it seems that the meetings ceased, or, at all events, were held very irregularly. The Petitioner never subscribed anything after that date; and it would seem, I think, from the evidence, that only a very few of the other members subscribed for a week or two afterwards. In this state of things application was made, by the Petitioner (as it is stated and admitted) to a gentleman who chiefly acted in the management of the concern, for payment of the money due to him in respect of his shares, and to have the concern wound up; and, that application not having been successful, he presented this petition.

The petition was resisted upon three grounds; first, it was said that the Petitioner was not entitled to present the petition; secondly, that the society was not a society within the meaning of the Winding-up Acts; and, thirdly, if it was, that no case had been made to render it incumbent, upon the Court, to make an order, or, if there was any discretion to be exercised, to induce the Court to exercise that discretion in favour of so winding up the concern.

With regard to the Petitioner not being entitled to apply for the order, it was said that, from the state of the accounts, it could be shown that he having had the benefit of a loan of 50*l.*, was greatly in arrear, to the society, with regard to the payments which he was bound, by the rules and regulations, to make on account of that loan, and that those arrears more than

1851.
SHERWOOD
LOAN
COMPANY.

exhausted his whole interest, and, therefore, he was no longer entitled to any portion of the property of the Company. But I do not think that that signifies; because the petition, according to the provisions of the Winding-up Act of 1848, is to be presented by any person being or claiming to be a contributory: and, by the interpretation-clause, any member of the concern is described to be a contributory. Now the petition is presented by a person claiming to be a contributory; and he says that there is a great deal due to him; therefore, I think that *that* objection is unfounded. I do not think it stands in the way of the petition.

Secondly, it was said that this was not a Company within the meaning of the Acts. Now I think it very doubtful whether it would have been within the meaning of the first Act. But, undoubtedly, the words of the second Act are so large as to take in almost every association if there be the requisite number of seven members; and there is no doubt that, in this Company, there are a great many more than that number. The language of the Act is very comprehensive: it embraces all partnerships, associations, and companies having more than seven members. I do not mean to give any opinion as to whether it is necessary, in order to bring an association within the meaning of the Act, that it should be formed for purposes of profit. But, supposing it to be necessary, I take it to be quite clear that profit was one of the objects, though not, perhaps, the primary object, for which this association was formed. Therefore, I am of opinion that the association is within the meaning of the Act.

Thirdly, it was said that, if the Petitioner was entitled to present a petition and the society was within the

meaning of the Act, still this was not a case in which the Court would direct a reference; because the Company was of such a nature that it must come to an end in the course of a few years; and, as a matter of discretion, the Court would not direct it to be wound up. The conclusion, however, which I have come to (though very reluctantly for a reason which I will state presently) is that I ought to make the order. The Act of Parliament expressly points out, as one of the grounds for winding up a Company, that the business of it has come to an end, and I think that, for all practical purposes, it must be taken that the business of this association has come to an end. I collect that, mainly, from the evidence of those gentlemen who are sought to be charged as having received the greater part of the funds. Mr. *North*, speaking, in one of his affidavits, of the Petitioner and certain other members who were dissatisfied with the way in which the affairs of the Company had been conducted, says that, to prevent any necessity for litigation or any unfriendly feeling, he had offered to pay, each of them, by instalments, the whole of the money paid, by each of them, unto the Company, but which they had refused to receive, without also being paid interest; that he refused to pay such interest, because, in consequence of the insolvency of several members of the Company and unavoidable losses thereby, the offer made by him, was more than they were legally or equitably entitled to, or could, by any legal or equitable means, obtain: that he made the offer from a desire to have the affairs of the Company wound up fairly and beneficially for all parties; and that he was not, in anywise, personally liable or answerable for the losses the Company had sustained, and ought not to be charged therewith. I do not at all mean to say that he ought to be charged; indeed it seems to me to be

1851.
SHERWOOD
LOAN
COMPANY.

1851.
SHERWOOD
LOAN
COMPANY.

extremely doubtful whether he can be charged at all ; but still the whole course of his conduct towards the parties shows that he, like all the rest of the persons concerned in this matter, was perfectly persuaded that the affairs of the company must be wound up some how or other. There is a similar expression in a subsequent part of the same affidavit : “ That, to prevent litigation, I have offered to pay all the members, having equitable or legal claims on the Company, all the money they have paid unto the Company, without interest ; which I consider a most liberal and beneficial offer, as they cannot, possibly, be entitled to more than that amount on a fair and equitable distribution of the remaining funds of the society.”

I think the case clearly is one in which the Petitioner is a party entitled to petition, that the society is a society to which both, or, at least, one of the Acts applies, and that the circumstances are such as make it the duty of the Court to direct the society to be wound up.

Mr. *Bethell*.—My Lord, we pressed your Lordship to consider whether you would not make the preliminary order for a reference to see whether it was expedient to wind up the society.

The *Vice-Chancellor*.—I have fully considered that, and I should be very glad to take that course always, because one gets rid of an uncomfortable responsibility ; but my objection to directing the preliminary reference is that I should be only directing the *Master* to tell me what I already know from the evidence before me ; and, therefore, I think that the best and cheapest course is to make the usual winding-up order at once.

My reason for saying, a short time ago, that I should make that order with reluctance, is that it appears, from one of the affidavits, that Mr. *North*, in order to prevail upon the Petitioner not to apply to the Court, had offered to pay his solicitor, 50*l.* for his costs; and that the solicitor declined that offer, saying that his costs already amounted to 85*l.* Now it really does stagger one to learn that, in matters of this sort, before anything is done, before even the presentation of the petition, 85*l.* costs are incurred.

1851.
SHERWOOD
LOAN
COMPANY.

I see that *Vice-Chancellor Knight Bruce* has made an observation to this effect, with regard to the Winding-up Acts, namely, that if those Acts were as beneficial to the rest of Her Majesty's subjects as they are to the profession of the law, they would be a great achievement in legislation.

1850 :
16th December :
and
1851 :
11th January.

*Joint-stock
companies
winding-up
Acts.*

Contributory.

A. applied, by letter, to the committee of a provisionally registered Railway Company, for fifty shares in the undertaking, and, thereby, undertook to accept them or any less number that might be allotted to him, and to pay the deposits thereon, and to sign the parliamentary contract and subscribers' agreement when required. The committee allotted him thirty shares; but he did not pay the deposits thereon or do any other act in pursuance of his undertaking. The project proved abortive; and the affairs of the Company were ordered to be wound up.

Held that *A.* was not liable, as a contributory, even to the extent of the deposits.

IN THE WINDING-UP OF THE DIRECT
BIRMINGHAM, OXFORD, READING, AND
BRIGHTON RAILWAY COMPANY.

EX PARTE CAPPER.

THE *Master* charged with the winding-up of the above provisionally registered Company, having placed Mr. *Capper's* name on the list of contributories, that gentleman now applied that his name might be erased from the list.

The prospectus of the Company stated, amongst other things, the capital of the Company to be 2,000,000*l.*, in shares of 25*l.* each, and the deposit to be 2*l.* 12*s.* 6*d.* per share, and that a survey of the line had been made, and found highly favourable to the construction of the line, without any engineering difficulty and at a moderate cost.

On the 19th of September 1845, Mr. *Capper* wrote a letter, to the provisional committee, applying for fifty shares, and *undertaking to accept the same or any less number that the committee might allot to him*, and to pay the prescribed deposit of 2*l.* 12*s.* 6*d.* per share thereon, and also to sign the parliamentary contract and subscribers' agreement, when required. In consequence of that letter, the managing committee allotted thirty

shares to Mr. *Capper*: and, on the 19th of October 1845, the secretary wrote him a letter informing him of that fact, and requesting him to pay the amount of the deposits on the shares, to the bankers of the Company, on or before the 24th of the same month, otherwise the allotment would be null and void; and adding that the now stating letter, with the bankers' receipt appended thereto, would be exchanged for scrip on Mr. *Capper* presenting it at the offices of the Company and executing the parliamentary contract and subscribers' agreement, which would lie at those offices on or about the 27th of the same month. Mr. *Capper*, however, did not pay the deposits on the shares allotted to him, or do any other act in pursuance of his undertaking.

1850.
CAPPER'S
CASE.

Mr. *Rolt* and Mr. *W. T. S. Daniel* supported the application.

Mr. *Bethell* and Mr. *Roxburgh* opposed it.

At the conclusion of the argument, the *Vice-Chancellor* said that the only point in the case which he wished to take time to consider, was one which had been raised, for the first time, by Mr. *Roxburgh*; namely, whether, as Mr. *Capper* had agreed to take fifty or any smaller number of shares that might be allotted him and to pay the deposits on them, he was not bound to contribute, to the extent of those deposits, to the expenses incurred by the Company: that, except for that point, he should have felt bound to say that Mr. *Capper's* name ought to be taken off the list.

1851 :
11th January.
CAPPER'S
CASE.

The VICE-CHANCELLOR :

In this case, the *Master* having placed the name of Mr. *Capper* on the list of contributories, a motion was made, a few days before the Christmas vacation, to remove his name from the list. I was disposed, at once, to make an order in conformity with the motion : but it was strongly urged on me, by Mr. *Bethell* and Mr. *Roxburgh*, that this case was distinguishable from all or most of the others which have been decided ; because, here, Mr. *Capper* had bound himself to take shares under circumstances which led, necessarily, to the conclusion that he had agreed to permit a part, at least, of the deposit which he had bound himself to pay, to be applied towards discharge of the preliminary expenses of forming this Company, and so that, to some extent at least, he had become liable to contribute to those expenses. For, in this case, as in a large proportion of those in which winding-up orders have been made, the affairs really to be wound up and the liabilities to be cleared, are those, not of any existing company, but of parties who have endeavoured, unsuccessfully, to form one. Though I did not feel that there was much force in the argument addressed to me, yet I wished to look into some of the authorities to which I was referred before I decided this case. I have now had an opportunity of doing so, and I have come to the clear conviction that Mr. *Capper's* name has been improperly placed on the list ; and so that it ought to be removed.

These questions, as I have already more than once remarked, are almost always questions of fact, not of law. The law on the subject is now very well understood. Persons engaged in forming a Railway Company, are neither a corporation nor a trading partnership. They are merely a number of persons endeavouring to

accomplish a particular object, that is, the establishment of a company, first, for forming and, afterwards, for working a railway. If they incur expense in endeavouring to effect their object and seek to render any one liable to any part of that expense, the question always is whether the person whom they seek to charge, did or did not authorize them to incur that expense on his account, or did or did not agree to indemnify them if they incurred it on their own account. Now this is a mere question of fact. If there had been no Winding-up Act, it would have been tried by an action at law; and, in deciding whether any particular name ought or ought not to be placed on the list of contributories, what the Court has to decide, is what ought to have been the result if such an action had been brought.

1851.
CAPPER'S
CASE.

Now, applying these principles to the present case, let us see what are the facts on which the *Master* has placed Mr. *Capper's* name on the list of contributories. The evidence before him was, first, a printed *prospectus* of the projected Company. Secondly, a letter from Mr. *Capper* to the Provisional Committee, dated the 19th of September, 1845, applying for shares and agreeing to pay, on what should be allotted to him, a deposit of 2*l.* 12*s.* 6*d.* per share, and to sign the subscribers' agreement and parliamentary contract. Thirdly, the form of a letter of allotment of shares in the Company; and, lastly, the book of the Company showing the allotment of thirty shares to him. Now I am of opinion that if, after the abandonment of the project, an action had been brought by the promoters against Mr. *Capper*, the Judge, on this evidence, would have been bound to direct a non-suit, or to have told the jury there was no evidence warranting them to find a verdict for the Plaintiffs: that, the scheme having proved abortive, there was no

1851.

CAPPER'S
CASE.

contract to pay any money at all. For what are the facts? It does not even appear that *Capper* ever saw the *prospectus*; but, if he did, it amounts to no more than this, that he was thereby made aware of the fact of a great number of persons having formed themselves into a committee for establishing the railway in question, with a certain capital and a certain number of shares: that this project had been provisionally registered under the 7 & 8 Vict. c. 110, and that all persons agreeing to take shares, would be called on to pay a deposit of 2*l.* 12*s.* 6*d.* per share. With this information, he applied for fifty shares, that is fifty shares in the Company to be formed; and in respect of which he was apprised he would, eventually, have to pay 25*l.* per share, if so much should be necessary; and would, at the outset, have to pay 2*l.* 12*s.* 6*d.* per share in part of the 25*l.* Let it be assumed that he engaged to make these payments. Still, before he had paid anything, the promoters with whom he had contracted, abandoned the project. And how is it made out that he even agreed to pay any part of the 2*l.* 12*s.* 6*d.* for anything else than a part of the purchase-money for his shares in the concern? There is no evidence whatever leading to any such conclusion.

The cases to which I was referred are, all of them, either clearly distinguishable from that now before me, or else distinctly establish my view of the subject. *Clements v. Todd* (a) was an action by a party who, though he had not signed the subscribers' agreement and parliamentary contract, had accepted scrip certificates on an express agreement that he should stand in the same situation as if he had signed those documents. It was admitted that, if he had signed them,

(a) 1 Exch. Rep. 268.

he would have been precluded from sustaining the action, which was an action to recover back the deposit on a total failure of consideration. He failed in his action, because it was shown that, by the terms of the subscribers' agreement, if he had signed it, he would have authorized the application of his deposit to the payment of preliminary expenses: and what the Court decided, was that he, by his express contract, stood in the same position as if he had signed the document. That case is, evidently, quite beside the present question.

1851.
CAPPER'S
CASE.

The next case was that of *Jones v. Harrison (b)*; and there, certainly, the Court held that, in that particular case, the party who had paid his deposit on a scheme which proved abortive, could not recover back what had been reasonably applied, by the directors, towards the preliminary expenses of forming the company. But this decision furnishes no authority for the general proposition contended for in this case; because the Court, there, proceeded, entirely, on the special nature of the contract. The letter of allotment, there, expressly stipulated that the directors should be at liberty to apply the deposits in discharge of any liabilities incurred, by them, under *the general powers* vested in them for the prosecution of the undertaking; and the Court held that by the words: "the general powers vested in them," were meant the powers which they were then exercising in causing surveys to be made and the like: so that, taking that to be, as I have no doubt it was, the true construction of the letter of allotment, the Plaintiff had clearly precluded himself from recovering back his money.

The next case is one entitled to very great weight,

(b) 2 Exch. Rep. 52.

1851.

CAPPER'S
CASE.

being a decision of the Court of Error. I refer to *Ashpitel v. Sercombe*, decided in February 1850, and reported in the 19th vol. of the Law Journal, p. 82, among the Exchequer cases. In that case, the Plaintiff, who was a member of the provisional committee, applied for two hundred shares, undertaking to accept the same or any portion thereof; to execute the subscribers' agreement and parliamentary contract, and to pay the deposit. The managing committee allotted to him only one hundred shares, apprizing him, as in the case now before me, that he must pay, by way of deposit, 2l. 12s. 6d. per share, and that he might get scrip for his shares on executing the subscribers' agreement and the parliamentary contract. The Plaintiff paid his deposit, but did not obtain scrip or execute the subscribers' agreement or the parliamentary contract. The project was, eventually abandoned; and the Plaintiff brought his action to recover back his deposit. At the trial, before Mr. Justice *Cresswell*, it was proved that very large expenses had been incurred in advertising and making necessary surveys and otherwise; and it was also proved that, by the subscribers' agreement, express authority was given, to the managing committee, to incur such expenses: but there was no evidence that the Plaintiff knew of the contents of the subscribers' agreement, or that its terms were such as, necessarily, must be included in the agreement which he engaged to sign. The learned Judge, at the trial, told the jury that if they were satisfied the project had been abandoned, the Plaintiff was entitled to recover. To this direction the Defendant tendered a bill of exceptions; and the jury having found for the Plaintiff, for the full amount of the deposit, the bill of exceptions came on for argument before the Court of Error. The Court held that the direction of the Judge was right: that it was for the Defendant to show, by

evidence, that the Plaintiff had sanctioned the expenditure of the deposit in outlay for preliminary purposes ; that the circumstance of his having accepted shares, paid the deposit and agreed to sign the subscribers' agreement (it not being shown that he was cognizant of the contents of the agreement, nor that the agreement to allow expenditure on preliminary expenses, was necessarily to be understood as forming part of the subscribers' agreement) furnished no evidence of any authority, to the directors, to expend any part of his deposit on preliminary expenses.

1851.
CAPPER'S
CASE.

Now this was the unanimous decision of the full Court, consisting of all the Judges of the Courts of Q. B. and C. B. except the Chief Justice, and it establishes, conclusively, that a person, by accepting shares and paying his deposit, does not, thereby, authorize the expenditure of any part of his deposit in the expense of forming the Company. It follows, *a multo fortiori*, that no person, by merely agreeing to take shares and pay his deposit, enters into any agreement to contribute to any expenses incurred or to be incurred before the Company is finally established.

The only other authority to which I was referred, was *Mathews' case*, reported in the 14th Jurist, 928. There, undoubtedly, *Vice-Chancellor Knight Bruce* may seem to have acted on a view of the law not in conformity to the cases I have just referred to. But I must remark that none of the authorities to which I have referred, were brought before the Court. The case was argued on the assumption that *Mathews* was clearly liable as a contributory, unless he could establish a fraud, on the part of the directors, on which he relied as exonerating him. His Counsel never argued that he was not liable

1851.

CAPPER'S
CASE.

if there had been no fraud ; and this course may have been quite advisedly pursued by them ; for *Mathews*, in his letter asking for shares, agreed to be bound by the regulations of the Company ; and, if it was part of those regulations that the deposits should be applicable to preliminary expenses, and that was known to him, the doctrine of the cases at law, would not apply ; or rather it would be a case in which, according to the decisions in *Clements v. Todd* and *Jones v. Harrison*, he was bound to contribute to the preliminary expenses. These considerations may well reconcile this case with the others : and I must suppose that, on some such ground as this, the decision proceeded.

I have now noticed all the cases to which I was referred ; and, so far from shaking the opinion I formed when the matter was before me, they strongly confirm me in it.

What I have to decide, is, as I have already stated, a question of fact rather than of law : and this Court, certainly, may, and very often must, decide a fact for itself. But, when it is once established, as matter of law, that a given state of circumstances affords no evidence for a jury warranting them to find a particular result, it is, certainly, the duty of this Court, when it has to say what is the legal result from that same state of circumstances, to arrive at the same conclusion : and, applying this reasoning to the case now before me, I think, even if there were no other authority (and there are many) the principle of the decision of the Court of Error in *Ashpitel v. Sercombe*, is decisive. The only facts relied on, here, are the *prospectus* ; the application for shares, with an agreement to pay the deposit, amounting to 10s. per 100l. beyond the sum required by the Standing

Orders, and the allotment in pursuance of that application. Now, even assuming all these facts to be made out, still they all existed in *Ashpitel v. Sercombe*; but the Court of Error there held that (even though the applicant in that case accepted the shares and paid his deposit), yet there was no evidence of an agreement to allow the deposit to be expended in preliminary expenses. I am, therefore, clear that Mr. *Cupper's* name ought to be erased from the list.

1851.
CAPPER'S
CASE.

The costs of the parties will come out of the fund.

IN THE WINDING-UP OF THE DIRECT BIRMINGHAM, READING AND BRIGHTON RAILWAY COMPANY.

EX PARTE SICHELL.

THE facts of this case were as follows.

1851 :
11th and 15th
January.
Joint-stock
companies
winding-up
Acts.
Contributory.

On the 10th October 1845, the secretary to the Company wrote to inform Mr. *Sichell*, who was a member of the provisional committee, that the committee of management had *apportioned* one hundred shares, in the Company, to each member of the provisional committee; and requesting to be informed, on or before Wednesday then next, whether Mr. *Sichell* would take that or any less number of shares. On the 14th of that month, Mr. *Sichell* wrote to the secretary, inquiring whether the surveyors would, positively, be ready for the next session; and adding that, should it be so, he should be happy to accept the one hundred shares *allotted* to him.

Motion that the name of a contributory might be struck off the list, refused with costs: the case being undistinguishable, in principle, from *Upfall's case*. That case observed upon.

1851.
SICHELL'S
CASE.

On the next day, the secretary replied that there was no doubt of the plans, &c. being ready, in the most perfect and satisfactory manner for the then coming Session of Parliament. On the 17th, Mr. *Sichell* replied as follows: "Please to put, in my name, fifty shares of the one hundred reserved for me in the Direct *Birmingham, Oxford, Reading and Brighton* Railway." On the 18th, the secretary wrote, to Mr. *Sichell*, informing him that the committee of management had allotted him fifty shares, and requesting him to pay the deposits thereon to the Company's bankers, on or before the 24th of the month, or the allotment would be null and void; and adding that the now stating letter, with the bankers' receipt appended thereto, would be exchanged for scrip, upon Mr. *Sichell* presenting it at the offices of the Company and executing the parliamentary contract and the subscribers' agreement, which would lie at the Company's offices on and after the 24th of the month.

The *Master* having placed Mr. *Sichell's* name on the list of contributories,

Mr. *Rolt* and Mr. *W. T. S. Daniel* now moved that it might be struck off. They distinguished this case from *Upfill's* (a) on the following grounds, namely, that an *apportionment* of shares was not a final allotment of them; and that *Sichell* did not accept the shares, except on a condition, which was not performed; namely that the Company would be prepared to go to Parliament in the then next session, and they referred to *Carmichael's* case (b).

Mr. *Roxburgh*, for the official manager, contended

(a) House of Lords Cases, 674.

(b) 17 Sim. 163.

that this case was undistinguishable from *Upfills*; and that it differed from *Carmichael's case*, because *Carmichael* never accepted any specific number of shares; but that it was a distinct acceptance of shares to say, as *Sichell* had done: "Put in my name fifty shares of the one hundred reserved for me."

1851.
SICHELL'S
CASE.

Mr. *Rolt* replied.

The VICE-CHANCELLOR:

I shall take the documents, in this case, home with me, in order that I may compare it with *Upfills case*: but I confess that I do not understand that case.

The VICE-CHANCELLOR:

11th January.

I took these papers home, for the purpose of ascertaining, accurately, what the letters and documents and the facts, in this case, were, and comparing it with *Upfills case*; because, though I stated that I do not know that I quite understand *Upfills case*, yet it is a perfectly binding decision no doubt. It was the decision of the House of Lords, and much considered, as far as the tribunal was constituted. There were not many Lords present; but I have nothing to do with that. It was a good deal considered by Lord *Brougham*, who gave great attention to the case; and the principle on which he decided, appears in many passages of his judgment; and particularly he says, in the latter part of it, after he had concluded, and when the subject was mentioned again: "I wish it to be distinctly understood, and it is of the greatest importance, that it is upon the two facts taken together that the judgment proceeds. One of them"—that is the being a provisional committeeman—"is found, at law, not to be sufficient without the second;

1851.

SICHELL'S
CASE.

and it is a question whether the second is sufficient without the first."

I observe that the case of *Ashpitel v. Sercombe* (c) was not brought before the House of Lords at all, in the case of *Hutton v. Upfill*; at least, it does not appear, by the Report, to have been cited. If it had been, no doubt Lord *Brougham* would not have said that it was not decided at law as to the second fact, when it is quite clear that was held to be nothing in *Ashpitel v. Sercombe*. However, what the House proceeded upon was this: that, where a party being a provisional committeeman, is informed that, in his character of committeeman, he is entitled to have a certain number of shares; and, acting upon that information, he accepts the shares, then, those two facts taken together, constitute him a contributory. That is the decision of the House of Lords. That being so, it is, at least, a very easy and intelligible state of facts. Whether the conclusion is such as I should have arrived at myself, I need not say. I have only to look at *Sichell's case* to see whether that state of circumstances did occur there. It happens to be the very same railway as in *Upfill's case*.

The evidence in *Upfill's case* was, first of all, this letter of information from the secretary to the Company: "I am requested to inform you that the committee of management has apportioned one hundred shares in this Company to each member of the provisional committee. You will please to inform me, on or about Wednesday morning next, whether you will take that or any less number. Should you not reply by

(c) 19 Law Journ. 82, Exch. Cases.

that time, the Committee will consider you decline taking any." That was the letter in the present case ; and, being a circular letter, it was the same letter as in *Upfill's case*. In answer to that, in *Upfill's case*, Mr. *Upfill* wrote : " I accept the one hundred shares allotted to me in the Direct *Birmingham &c.* Company. —*James Upfill*, P. C."—" P. C." meaning Provisional Committeeman. In the present case, as in *Upfill's case*, the party was a provisional committeeman ; and, upon receiving that letter, he writes : " I feel obliged for your circular of the 10th instant ; but, upon looking into the report of the committee, I find no remark made whether the surveyors will, positively, be ready for the next session ; and you will, perhaps, drop me a few lines on the subject ; for, should it be so, I shall be happy to accept the one hundred shares allotted to me." To which the secretary answers : " There is not any doubt of our plans &c. being ready, in the most perfect and satisfactory manner, for the coming session of Parliament." In answer to which, on the 17th of October, Mr. *Sichell* writes this letter :—" Sir, please to put in my name fifty shares of the one hundred reserved for me in the Direct *Birmingham, Oxford, Reading and Brighton* Railway."

1851.
SICHELL'S
CASE.

Now the only question is whether that correspondence amounts to the same thing as the correspondence did in *Upfill's case*. I confess I think it does. Mr. *Rolt* endeavoured to distinguish it on the ground that there was only a conditional acceptance. *Sichell* said :—" I will not accept, because I must first be satisfied that the scheme will be ready for the next session of Parliament." The only meaning of that is :—" I do not like to take the shares till I am satisfied on that point." But the secretary writes something which does satisfy him :

1851.

SICHELL'S
CASE.

whether it was right or not is not of any importance. He waives the objection and says :—"Please to put in my name fifty shares of the one hundred reserved for me." In *Upfill's case* the expression was :—"I accept the one hundred shares allotted to me." It would be ridiculous to say that there is any difference between the one case and the other. *Upfill* says :—"You tell me I may have one hundred shares; I will have them." *Sichell* says :—"You tell me I may have one hundred shares; I will have fifty of them." The *quantum* of shares makes no difference.

In *Upfill's case*, also, it was said, as it was in this, that there was only an apportionment of shares; and that an apportionment did not amount to an allotment. But Lord *Brougham* considered the distinction to be a mere verbal one, and said that apportioning meant the same thing as allotting: and so do I.

It seems to me that this case is undistinguishable, in principle, and, indeed, scarcely in a single word, from *Upfill's case*; and, therefore, *Upfill's case* will govern it; and Mr. *Sichell's* name must remain on the list.

Motion refused with costs.

IN THE WINDING-UP OF THE DIRECT
BIRMINGHAM, OXFORD, READING AND
BRIGHTON RAILWAY COMPANY.

EX PARTE BEST.

THE *Master* charged with the winding-up of the Company in this case, had placed Mr. *Best's* name on the list of contributories; but *Vice-Chancellor Knight Bruce*, on a motion, by way of appeal from the *Master's* decision, being made before him, ordered the name to be erased. Afterwards, the *Master*, on new evidence being brought before him by the official manager, and after hearing both sides, ordered the name to be restored.

Mr. *Rolt* and Mr. *Prior*, for Mr. *Best*, now moved that the name might be again erased, on the ground that, as Mr. *Best* had been, *previously, specially excluded from the list*, the *Master* had no jurisdiction to restore his name. They relied on the 81st sect. of the Winding-up Act of 1848, 11 & 12 Vict. c. 45.*

Mr. *Bethell* and Mr. *Roxburgh*, for the official manager, referred to the 17th and 27th sections of the Act of 1849, 12 & 13 Vict. c. 108.*

The *Vice-Chancellor*, after observing that *Best's case* was undistinguishable, *in point of merits*, from *Upfill's case*, proceeded thus:—

1851:
11th and 15th
January.

*Joint-stock
companies
winding-up
Acts.*

*Contributory.
Jurisdiction of
Master.*

After the *Master* had inserted *B.'s* name in the list of contributories, and after the Court, on appeal, had ordered it to be struck off, the *Master*, on new evidence being brought before him, ordered the name to be re-placed on the list.

The Court held that the *Master* had exceeded his jurisdiction, and ordered the name to be again struck off.

* These sections are stated in the Judgment.

1851.

BEST'S
CASE.

My opinion, on the construction of these Acts of Parliament, is that the *Master* could not do what he has done. That seems, to me, to be pretty clear.

By the 81st section of the first Act, it is enacted :—
 “That it shall be lawful for any person whose name shall stand upon the list of contributories, to summon any other person whose name shall not be upon such list and who shall not have been, previously, specially excluded therefrom, to appear, before the *Master*, at a day and time to be therein specified, to show cause why his name should not be included in, or specially excluded from, the list :” that is to say, if the name has not been excluded from the list, the party may be summoned ; but, if he has been specially excluded, his case cannot be reconsidered. Then comes the Amendment Act. How does that alter it ? The 17th section says :—“ It shall be lawful, for the *Master*, from time to time, to reconsider and review any order or proceeding which may have been made by, or may have taken place before him under the said Act, upon such terms and in such manner as he thinks fit.” If there was nothing more, it is clear to me that, as the former Act had said, in terms, that a party who had been specially excluded, should not be put on the list again, that did not authorize the *Master* so to proceed. How does the 27th section alter it ? Not at all. The 27th section says :—“ That the power, by the said Act given to contributories, to summon any other person to show cause why his name should not be included in, or specially excluded from the list ”—because it may, under certain circumstances, be beneficial to a party to have his name on the list as a contributory in order to get something in the distribution of the calls—“ and the power of the *Master*, to declare such person included in or excluded from the

list, shall and may be exercised, from time to time, so long as the list has not been wholly settled, although the person so to be summoned have been already included or specially excluded (as the case may be) as respects *any other share or interest in the Company than the share or interest in respect of which he is proposed to be included in, or specially excluded from the list.*"

1851.
BEST'S
CASE.

Now, according to the true construction of the former Act, if Mr. *Best's* name had been once excluded from or included in the list, as the case might be, under no circumstances could he be summoned to be included or excluded contrary to what had been before decided. But, then, this Act of Parliament contemplates that the party who has been included or excluded, may be shown to have some other shares than those in respect of which he was before included or excluded, and that he may be entitled to be included or excluded in respect of them; and then he may be proceeded with, with respect to those other shares, just as if he had never been dealt with at all; but it does not otherwise alter the former Act. Therefore, I think that this motion must be granted. Mr. *Best's* name must be taken off the list, because the *Master* had no jurisdiction to put it on a second time.

The costs, including the costs in the *Master's* Office, must be paid out of the estate.

It is a great misfortune, owing to the hurried way in which *Upfill's case* was necessarily argued at the end of the last session of Parliament, (it being, as Lord *Brougham* said, extremely important to get the matter

1851.

BEST'S
CASE.

settled,) that the case was heard without the assistance which might have been had if more time had been allowed, and that not one of the cases in the Court of Exchequer and in the Court of Error, was brought under the consideration of the House.

1851 :
10th January :
and
27th February.

*Restraint on
anticipation.
Separate
property.
Feme covert.*

IN THE MATTER OF ROSS'S TRUST.

EX PARTE COLLINS.

A testator, after having bequeathed a sum of stock in trust for the separate use of his wife for her life, directed that it should remain, during her life, and be, under the order of the trustees, made a duly administered provision for her, and the interest of it given to her, *on her personal appearance and receipt*, by any banker the trustees might appoint. Held that the wife was not prohibited from alienating her interest in the stock.

JAMES ROSS, by his will dated the 4th of September 1824, bequeathed 3000*l.* Consols to trustees, in trust to pay and apply the annual interest (being 90*l.*) unto his wife, *Ann Ross*, (from whom he had been some time separated), and in lieu of any claim or claims, for or during her life, for her sole and separate use, independent of any husband she might thereafter marry and of his control, debts and engagements; and her receipt and receipts, notwithstanding her coverture, should be a sufficient discharge or discharges, to the said trustees: and the testator willed and directed that this 3000*l.* capital 3*l.* per Cent. Consols stock, *should remain, during his said wife's life, and be, under the orders of the said trustees, made a duly administered provision for her, and the interest of it given to her, on her personal appearance and receipt*, by any banker or bankers the said trustees might appoint in *London* or elsewhere, as might suit the parties, by half-yearly instalments of 45*l.* sterling each, at Midsummer and Christmas, and to commence

on the next half-yearly day after his decease, but to cease and be void on her death, together with the trust; and the capital of 3000*l.* Consols stock to be rendered back to his estate, by the said trustees, their executors, administrators and assigns, and to become, in like manner as his other personal property, the joint and separate property of the legitimate children of his brother *Thomas Ross*, their heirs, executors and administrators.

1851.

Ross's
TRUST.

The testator died in 1831. After his death, his widow married *Thomas Weatherell*. In February 1849, she and her husband (who afterwards died), sold and appointed and assigned her life-interest in the Consols, to the Petitioner: after which the trustees transferred the capital into Court, under the Trustees Relief Act.

The petition prayed that the *Accountant-General* might be directed to pay, to the Petitioner, the dividends to accrue due on the Consols, during the remainder of Mrs. *Weatherell's* life.

On the hearing of the petition, the question was, whether the trust created by the will in favour of Mrs. *Weatherell*, was, simply, a trust for her separate use, or a trust for her separate use with a restraint on alienation.

Mr. *Southgate*, for the Petitioner, contended that the trust was, simply, a trust for the separate use of Mrs. *Weatherell*. He cited *Pybus v. Smith (a)*, *Parkes v.*

(a) 3 Bro. C. C. 340.

1851.

Ross's
TRUST.

White (b), Acton v. White (c), Scott v. Davis (d), and 2nd Roper on Husb. and Wife, 231.

Mr. *Bethell* and Mr. *T. S. Clarke*, for Mrs. *Weatherell*, contended that the trust was a trust for her separate use with a restraint on alienation. They said that no particular form of words was necessary to prevent a woman from alienating property settled to her separate use; but the intention of the author of the instrument to impose the restraint, might be collected from the whole of the instrument: that the testator in this case, had, first, created a trust for the separate use of his wife, and then added a direction that the subject of that trust should remain, during her lifetime, and be, *under the order of the trustees, a duly-administered provision for her*, and the interest of it given to her, *on her personal appearance and receipt*; which was inconsistent with a power of alienation in the wife; and that, as the testator had completed the trust for her separate use in the preceding part of his will, the direction in the subsequent part, could not be satisfied without holding that the provision which the testator had made for his wife, was inalienable: *Wagstaff v. Smith (e), Brown v. Bamford (f), Moore v. Moore (g), Field v. Evans (h), Nedby v. Nedby (i), Tullett v. Armstrong (k), In the matter of Gaffee's Trust (l).*

Mr. *Rolt* appeared for the trustees.

(b) 11 Ves. 209.

(c) 1 Sim. & Stu. 429.

(d) 4 Myl. & Cr. 87, see

89.

(e) 9 Ves. 520, see 524.

(f) 1 Phill. 620.

(g) 1 Coll. 54.

(h) 15 Sim. 375.

(i) 4 Myl. & Cr. 367.

(k) *Ibid.* 390, see 392.

(l) 1 Hall & Twells, 635,

and 1 Macn. & Gord. 541.

The *Vice-Chancellor* said that the words attributed to Lord *Cottenham* in the report of *Scott v. Davis* (a), namely, that the decisions seemed to require that the intention to restrain a married woman from aliening property settled to her separate use, should be expressed in a particular form of words, and that anticipation should be, in terms, prohibited, could not have fallen from his Lordship; for neither the words, "without anticipation," nor any other particular form of words, were necessary for that purpose: that the question in this case, was whether the direction that the capital of the trust-fund should remain, during Mrs. *Weatherell's* life, and be, under the order of the trustees, made a duly administered provision for her, and the interest of it given to her, on her personal appearance and receipt, was a direction which necessarily implied that she should not alienate the dividends of the fund: that the words, "on her personal appearance and receipt," did, at first sight, appear so to imply; but it had been decided, repeatedly, that a direction for payment to a married woman on her sole receipt, did not restrain her from alienation; and the case referred to by Sir *William Grant*, M. R., in *Wagstaff v. Smith*, decided, in effect, that a direction for payment to her on her personal appearance, did not have that effect; for that case decided that a direction to pay into her proper hands did not deprive her of the power of disposition; and no payment could be made into her proper hands, without her personal appearance: and, therefore, the Petitioner was entitled to the order which he asked.

1851.

Ross's
Trust.

On this day the Petition was placed in the paper, to 27th February.
be spoken to as to costs. The question was whether the

(a) 4 Myl. & Cr. 87, see 89.

1851.

Ross's
Trust.

costs were to be paid, wholly, out of the fund in Court, or, in part, out of the residue of the testator's personal estate.

The *Vice-Chancellor*, after a good deal of discussion, in which Mr. *Malins* and Mr. *Fooks* took part, as Counsel for the children of the testator's brother *Thomas Ross*, refused to give Mrs. *Weatherell* any costs, but ordered the costs of the Petitioner, as between party and party, and the costs of the trustees, as between solicitor and client, to be paid out of the corpus of the fund in Court.

1851 :

22nd January.

Assets.
Equity of
redemption.
Debtor and
creditor.

The equity of redemption of a mortgage in fee, is made legal assets by 3 & 4 Will. IV. c. 104.

FOSTER v. HANDLEY.

THIS was a creditors' suit, for the administration of the estate of the late *Henry Handley*, Esq., which consisted, in part, of the equity of redemption of a mortgage in fee of freehold property ; but which he had not charged with, or devised subject to the payment of his debts. The trustees of his will sold the equity of redemption ; and, after paying off the mortgage-debt out of the proceeds, they paid the surplus into Court in trust in the Cause.

The question, at the hearing, was whether the surplus was to be dealt with as legal or as equitable assets, under the 3 & 4 Will. IV. c. 104, which enacts : " That when any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customary-hold, or copyhold, which he shall not, by his last will, have charged with or devised subject to the

payment of his debts, the same shall be assets, to be administered in Courts of equity, for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates, was or were, before the passing of this Act liable to, in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound: Provided, always, that in the administration of assets by Courts of equity under and by virtue of this Act, all creditors by specialty in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound, shall be paid any part of their demands."

1851.
 FOSTER
 v.
 HANDLEY.

The *Vice-Chancellor* held that the proviso in the Act, made the equity of redemption legal assets; and, consequently, that the creditors by specialty in which the heirs of the deceased were bound, were entitled to be paid the full amount of their debts, out of the money in Court, before any part of it was applied in payment of the debts of the creditors by simple contract.*

Mr. *Smale* and Mr. *Waley* were the Counsel in the Cause.

* See 2 Coote on Mortgages, page 98.

1851:
January 25th.

*Liverpool
Dock Acts.
Lands Clauses
Consolidation
Act.*

*Re-investment
of compensation
money.*

Money paid into Court by the *Liverpool Dock Trustees*, in respect of leaseholds for years, taken by them under the powers of their Act of Parliament, ordered to be reinvested in the purchase of copyholds of inheritance.

IN THE MATTER OF COYTE'S ESTATE, AND
IN THE MATTER OF THE LIVERPOOL
DOCK ACTS.*

BY the will of *William Coyte* dated the 5th of September 1831, certain houses in *Liverpool*, being leaseholds for years, were devised to his daughter, *Julia*, for her separate use, for life, and, after her decease, to her issue living at her death as purchasers; but if she left no issue living at her decease, then to the testator's son, *William*.

The testator died in 1832. *William*, his son, died in 1833, intestate. *Julia*, after the testator's death, intermarried with *H. Walker*, and had issue two children, who were infants at the time of making the order after-mentioned. In June, 1849, the trustees of the *Liverpool Docks*, in exercise of the powers contained in the *Liverpool Dock Acts*, took the said houses and paid 630*l.*, the amount of the purchase-money and compensation, into Court. A petition was, thereupon, presented, by *Julia Walker* and her husband, for the re-investment of the 630*l.* in copyholds of inheritance. On this petition the Court made the usual reference to the *Master*.

Master Tinney, by his report, certified, amongst other things, as follows: "Having regard to the fact that the land and premises sold to the trustees of the *Liverpool Dock Company*, were leasehold, and that the land and

* *Ex relatione* Mr. J. Nicholson.

premises proposed now to be purchased with the money arising from such sale, are copyhold of inheritance, I humbly submit, to the judgment of this honourable Court, whether the same is a proper investment." The *Master* also reported that it would be for the benefit of all parties interested, that the 630*l.* should be invested in the copyholds.

1851.
IN RE THE
LIVERPOOL
DOCK ACTS.

The petition of *Julia Walker* and her husband to confirm the report and for consequential directions, now came on for hearing.

Mr. *J. Nicholson* for the Petitioners, referred to the *Liverpool Dock Act*, 7 & 8 Vict. c. 80, s. 22,* which, he argued, gave the Court jurisdiction to order such a reinvestment as would give the parties interested the same benefit, though, not necessarily the same estate, as they had in the land taken by the Company. The *Master* had found that the proposed investment was for the benefit of all parties interested.

* The 22nd section of the *Liverpool Dock Act*, 7 & 8 Vict. c. 80, is, substantially, the same as the 74th section of the *Lands Clauses Consolidation Act*, and is as follows:—"That, where any purchase-money or compensation paid into the Court of Chancery, under the provisions of this Act, shall have been paid in respect of any lease for lives or years, or any estate in lands less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful, for the Court of Chancery, on the petition of any party interested in such money, to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said Court may consider will give, to the parties interested in such money, the same benefit therefrom as they might have legally had from the lease, estate, or reversion in respect of which such monies shall have been paid, or as near thereto as may be."

1851.

IN RE THE
LIVERPOOL
DOCK ACTS.

Mr. *Hare*, for the administrator of *William Coyte*, the son ; and

Mr. *Bourdillon*, for the Dock trustees, consented to the application.

The *Vice-Chancellor*, at first, doubted whether he could sanction such an investment, and asked by what form of order it was proposed to effect the object of the Petitioners. The minutes, as stated below, so far as they are special, having been read to the Court, his Lordship thought that, under all the circumstances of the case, he might venture to make the order according to the proposed minutes.

Declare that the copyhold hereditaments in the petition mentioned, are a proper purchase, wherein to invest the 630*l.* cash, subject to the directions hereinafter given. Refer it to the said *Master*, to approve of a proper conveyance and surrender of the said copyhold hereditaments, to two trustees, their heirs and assigns, upon trust for the Petitioner, *Julia Walker*, during her life, subject to such terms and conditions, as by the will of *W. Coyte* the testator, are expressed and declared of and concerning the leasehold houses in the said will mentioned ; and, from and after the decease of the said *Julia Walker*, upon trust to sell the said copyhold hereditaments, and to stand possessed of and interested in the monies to arise from such sale, upon trust for the person or persons, who would, on the death of the said *Julia Walker*, be entitled, under the said will, to the said leasehold houses. Let the *Master* approve of two proper persons to be trustees, for the purposes aforesaid, of the said copyhold hereditaments ; and order that such trustees declare the trusts thereof, accord-

ingly, by deed, such deed to be settled and approved of by the *Master*.

1851.

IN RE THE
LIVERPOOL
DOCK ACTS.

Price & Lay 11th R 400.

WEST v. JONES.

THIS case was argued on the 28th and 29th of January 1851, by

1851 :
28th and 29th
January :
and
19th February.

Mr. *Bethell* and Mr. *Lewin*, for the Plaintiff; and

*Mortgagor and
mortgagee.*

Mr. *Rolt* and Mr. *W. M. James* for the Defendants.
The facts are stated shortly in the marginal note, and, fully in the judgment,* where the arguments also are stated and observed upon.

In March 1840, *A.*, and *B.* a solicitor at *Carmarthen*, raised 2500*l.* by sale of a sum of stock of which they were trustees, with the intention of lending it, on mortgage, to *C.* who resided at *Carmarthen*, but spent part of the year in

On the 19th of February,

The VICE-CHANCELLOR delivered the following judgment :

The bill in this case, seeks to establish, against the

* See *post*, p. 208 *et seq.*

London. *A.* enabled *B.* to receive the 2500*l.* for the purpose of the loan, and intrusted him with the conduct of the transaction. Accordingly *B.* prepared the mortgage-deed ; and, on the 29th of May 1840, through his *London* agents and by arrangement between him and *C.*'s solicitor, procured *C.* (who knew that the money was in *B.*'s hands) to execute it, and to sign a receipt, on the back of it, for the 2500*l.* The agents took the deed away with them ; and, shortly afterwards, procured *A.* to execute it, and then sent it to *B.* It having been arranged, between *B.* and *C.*, that the mortgage-money should be paid into the *Carmarthen* bank, to *C.*'s credit, *B.*, on the 31st of May, paid 513*l.*, and, on the 31st of October, 1050*l.*, accordingly, in part of the 2500*l.* In November he died insolvent.

Held that, as between *A.* and *C.*, *A.* was to be treated as mortgagee for the whole 2500*l.*

1851.

WEST

v.

JONES.

Defendants, who are the executors and devisees in trust of the late *John Jones*, of *Ystrad*, a mortgage-security for 2500*l.*: and it prays a declaration that the Plaintiff is entitled to be treated as a mortgagee to that amount, with further relief consequential on that state of things. The question in the cause is, whether the Plaintiff is entitled to be treated as a creditor, by mortgage, for that amount, or only for a smaller sum of 1563*l.* 16*s.* 8*d.*

There is no doubt of the fact that, on the 27th May 1840, *Jones* executed certain indentures of lease and release, dated the 26th and 27th days of May, 1840, and that he, thereby, conveyed, to the Plaintiff and to *Lewis Richard Vaughan*, since deceased, and their heirs, certain freehold property situate partly in the Metropolis, partly in *Cardiganshire*, and partly in or close to the town of *Carmarthen*. The conveyance purports to be made in consideration of 2500*l.* advanced to *Jones* by the Plaintiff and *Vaughan*, and there is a proviso for redemption on repayment of that sum with interest. The day for payment is not stated, being left in blank. At the time of the execution, *Jones* also signed on the back of the deed, a receipt for the whole 2500*l.* At the same time, by way of further security, *Jones* conveyed the equity of redemption of other large estates, then already in mortgage to an insurance office for a sum of 30,000*l.*: but I do not think that anything turns on that circumstance. In fact, that additional mortgage was of no value, the property having turned out to be insufficient to satisfy the prior mortgage. *Vaughan*, one of the mortgagees, died in November 1840; and *Jones*, the mortgagor, died in November, 1842. After the death of *Jones*, various parts of the mortgaged property were sold by the Defendants as

devisees in trust of his property, and the purchase-money was paid, to the Plaintiff, in part discharge of what was due to him. This was all done with his concurrence, and without prejudice to his rights as to the balance not satisfied by the produce of the sales. Under these circumstances, *primâ facie*, the Plaintiff is entitled to an account of what is due to him on the footing of his being a mortgagee for 2500*l.* That is the sum stated on the face of the deed, and by the receipt indorsed, as the sum advanced by the mortgagees.

1851.
WEST
v.
JONES.

But the case made by the Defendants is that no such sum was really advanced: that the deed was prepared by the mortgagees, and executed by *Jones*, the mortgagor, upon a contract, by the mortgagees, that they would advance that sum, but that, in fact, they never did so: that, in truth, the only sums advanced were, first, a sum of 513*l.* on the 30th May, 1840, and, secondly, a sum of 1050*l.* 16*s.* 8*d.* on the 31st October following: and so the Defendants say that the mortgage ought to stand as a security for those sums only.

It is clear, on the evidence, that *Jones* never, in fact, received more than those two sums: but the question is whether he so conducted himself, in the transaction, as to entitle the Plaintiff to say that, whatever may be the truth of the case, he is entitled to treat *Jones* as having received the whole 2500*l.* In order to establish his right so to do, the plaintiff relies on a principle perfectly familiar, not only to Courts of equity, but also to Courts of law; namely, that, where a party has, by words or by conduct, made a representation to another leading him to believe in the existence of a particular fact or state of facts, and that other person has acted on the faith of such representation, then the party who

1851.

WEST

v.

JONES.

made the representation shall not afterwards be heard to say that the facts were not as he represented them to be. This doctrine, it may be observed, is not confined to cases where the original representation was fraudulent. Where, indeed, that is the case; where a party makes a representation which he knows to be false in order thereby to induce another to act on the belief that it is true, and that other party does so act, the whole transaction is, in the strictest and most obvious and popular sense of the word, a fraud. But the doctrine, not only of this Court, but also of Courts of law, goes much further. Even where a representation is made in the most entire good faith, if it be made in order to induce another to act upon it, or under circumstances in which the party making it may reasonably suppose it will be acted on, then, *primâ facie*, the party making the representation, is bound by it, as between himself and those whom he has thus misled.

These principles being clear, the question, here, is one of fact. Has the Plaintiff made out that *Jones* said or did, or omitted to say or do anything, the saying, doing or omitting to say or to do which, now precludes his representatives from insisting, as between them and the Plaintiff, on the truth of the case; namely, that a part only of the 2500*l.* was ever advanced and lent to *Jones*? In order to arrive at a just conclusion on this point, we must, first, ascertain the material facts of the case relative to the advance of the money.

It appears that, in the year 1839, the Plaintiff and *Lewis R. Vaughan* were co-trustees of the marriage settlement of a deceased brother of Mr. *Vaughan*; and, in that character, they had, standing in their names, a sum of about 5000*l.* Consols, the whole or a part of

1851.

WEST
v.
JONES.

which they were willing to sell out in order to lend the proceeds on mortgage. The Plaintiff resided in *London*. *Vaughan* was a solicitor living at *Carmarthen*. Mr. *Jones* resided at *Ystrad* near *Carmarthen*; but I collect that, being a member of Parliament, he was generally resident in *London* during the session. His affairs, so far, at all events, as relates to the matters in question in this suit, were managed by Mr. *Gardner*, a solicitor at *Carmarthen*. *Jones*, being indebted largely to the *Carmarthen* bank, was anxious, towards the close of the year 1839, to borrow a sum of money on mortgage in order to enable him to discharge his debt to the bank, and, in this state of things, a negotiation was opened, between *Vaughan* and *Gardner* acting for *Jones*, the result of which was that *Vaughan*, eventually, agreed to lend *Jones* 2500*l.*, to be secured by the mortgage now forming the subject of this suit. The money which *Vaughan* so agreed to lend, was to be raised by sale of part of the trust funds so standing in the joint names of the Plaintiff and himself. *Gardner* informed the *Carmarthen* bank of this intended mortgage, and agreed that the money, when advanced, should be paid to *Jones's* account with them; and, on the faith of that assurance, they made further advances to *Jones*, the particulars of which I do not think it necessary to state. The early part of the year 1840, seems to have been occupied, by *Vaughan*, in the investigation of the title and preparing the mortgage deeds; but, on the 27th March 1840, *Vaughan* wrote, to the Plaintiff, to say that everything was ready; and he asked the Plaintiff to procure a power of attorney for selling a sufficient part of the trust stock, standing in their names, to raise the 2500*l.*, or, rather, 2600*l.*; but the additional 100*l.* had no reference to the mortgage, and need not now be adverted to. The necessary power was obtained and executed by the

1851.

WEST

v.

JONES.

Plaintiff and by *Vaughan*. The 2600*l.* was then raised by sale of part of the trust stock, and, on the 15th of April, the proceeds, 2600*l.*, were, by authority of the Plaintiff, remitted to the *Carmarthen* bank, to the sole credit of *Vaughan*, in order that he might apply 2500*l.*, part of it, on the proposed loan of *Jones*. The mortgage deeds having been prepared and engrossed by *Vaughan*, were, by him, transmitted to his *London* agents, Messrs. *Walker* and *Grant*, in order that they might procure the execution thereof by *Jones*, who was then in *London*, attending to his parliamentary duties, and also by the Plaintiff. And, accordingly, on the 27th of May, a clerk of *Walker* and *Grant* took the deeds to *Jones*, who, in his presence, executed them, and, at the same time, signed the usual receipt for the 2500*l.*, though no money passed on the occasion. On the 29th of May, the same clerk took the deeds to the Plaintiff, who executed them; and they were, afterwards, returned, by *Walker* and *Grant* so executed, to *Vaughan* at *Carmarthen*. On the 30th May *Vaughan* paid, into the *Carmarthen* bank, 513*l.* on account of the mortgage money. It should be stated that, when *Jones* executed the deeds, there were blanks left as to the days of payment of the mortgage money; and *Jones*, on the day after his execution of the deeds, wrote, to *Gardner*, informing him that he had signed them, and desiring him to see that the blanks were properly filled up. I am satisfied, on the evidence, as matter of fact, that, pursuant to those instructions, *Gardner* did, from time to time, apply to *Vaughan*, to fill up the blanks, and to pay the balance of the money to the credit of *Jones* at the bank. But such applications were attended with no result until the 31st of October following, when *Vaughan* paid, to *Jones's* credit at the bank, a further sum of 1050*l.* 16*s.* 8*d.* At the latter end of the following

month of November, *Vaughan* died insolvent ; and the question is whether the Plaintiff or the representatives of *Jones*, are to bear the loss of the balance of the mortgage money occasioned by that insolvency.

1851.
WEST
v.
JONES.

The Plaintiff, in support of his equity, insisted, first, that *Jones*, or, which is the same thing, *Gardner*, certainly, knew that the money was trust-money, held, by the Plaintiff and *Vaughan*, upon trust for somebody ; and this is clearly made out by the evidence. There is, however, no question here between the trustees of the money or those who were dealing with them, on the one hand, and the *cestuis que trust*, on the other. The lending of the money on mortgage, was no breach of trust ; and the knowledge that the money was trust-money, does not seem to me to carry the case further than the knowledge that it was a fund held by the Plaintiff and *Vaughan* jointly. In dealing as to the money with third persons, the Plaintiff and *Vaughan* were merely joint owners and joint lenders. I do not think that the circumstance of their joint ownership being that of trustees, affects the case.

The next fact which the Plaintiff relies on, is that, before May 1840, and, therefore, some weeks at all events before the execution of the mortgage, *Gardner* knew that the 2500*l.* had been remitted to *Vaughan*. And this seems to me to be clearly made out. It may, therefore, be taken, as established, that *Vaughan*, having agreed to lend, on mortgage, 2500*l.*, being money which he held as co-trustee with the Plaintiff, receives, from the Plaintiff, the whole of that money in order that it may be paid over to the borrower, and that this was known to the intended borrower. In this state of things, *Vaughan*, who must, I think, clearly be treated as the

1851.

WEST

v.

JONES.

agent of the Plaintiff in the matter of the loan and as being authorized to act for him, procures *Jones*, the borrower, to execute the deed, and to sign the usual receipt for the mortgage-money, before, in fact, any part of it had been advanced. Of course, as between *Jones* and *Vaughan*, that execution and signature would avail nothing. *Vaughan* could never be allowed to say, to *Jones*, "You have admitted the receipt of 2500*l.*, and I shall hold you to that admission." As between *Jones* and *Vaughan*, the execution of the deed, though the receipt of the whole mortgage-money is admitted, was clearly an act done merely with a view prospectively to secure the 2500*l.* when it should have been advanced.

But the question is what is its effect as between *Jones* and the Plaintiff? And, in order to arrive at a just conclusion on this point, let us first consider how the case would have stood if *Vaughan* had been a mere agent for the Plaintiff, that is to say, suppose the money had been wholly the money of the Plaintiff, and that the Plaintiff had employed *Vaughan*, his attorney at *Carmarthen*, to lend it on mortgage to *Jones*, and, for that purpose, had remitted it to *Vaughan* at *Carmarthen*, and that all this was known to *Jones*, the borrower. If, in such a state of things, *Jones* should have executed the mortgage and delivered it to *Vaughan* without receiving the money, he would, obviously, have put it in the power of *Vaughan* to cheat his employer by representing to him that he had paid the money over to *Jones*, when, in fact, he had not done so. The Plaintiff would, reasonably, suppose when he saw that the deed had been duly executed by *Jones* with a receipt for the money indorsed, that *Vaughan*, his agent, had performed his duty by paying over the money, and so

obtaining the due execution of the deed. *Jones*, in such a case, knowing that *Vaughan* held the money merely as agent of the Plaintiff, certainly ought not to have executed and parted with the deed without first receiving the money. Or, if he did so, he would, thereby, alter the relation of *Vaughan* towards the contracting parties. *Vaughan* would, thenceforth, hold the money as agent, not for the Plaintiff, but for *Jones*.

1851.
WEST
v.
JONES.

The question then comes to this: How far is the case altered by the circumstance that *Vaughan* was not a mere agent for the Plaintiff, but was a co-lender with him of the money? This is the part of the case on which I have had considerable doubt. But I have arrived at the conclusion that the same principles which would have prevailed if the Plaintiff had been the sole owner of the money, are equally applicable to the actual facts of this case; namely, the loan of money belonging jointly to the Plaintiff and to *Vaughan*. In the former case, the borrower, by executing and delivering the deed to the agent, says, impliedly, to the principal, that is to say, the lender: "I have received your money through the hands of your agent, and you need not trouble yourself further about it." In the latter case, he says: "Your co-trustee, in whose hands you placed the trust-money in order that it might be lent to me, has lent it to me, and I have given him a mortgage by way of security to him and to you." But the material point, in both cases, is the same. The borrower, in the one case as in the other, enables the party actually trusted with the money, to satisfy the party trusting him that it has been duly applied; and the principle of both Courts of law and Courts of equity in such cases, is that the party acting or abstaining to act on the faith of such a representation, has a right,

1851.

WEST

v.

JONES.

as between himself and the person by whom he has been so misled, to treat the representation as true.

It was argued, for the Defendant, that, in this case, the money was in proper custody when it was in the hands of *Vaughan*; that it was, in fact, his money as much as the money of the Plaintiff, and so that the doctrine applicable to the case of money in the hands of an agent, could not be followed; that, here, the execution of the deed, could not mislead the lender; for that *Vaughan*, himself, was the lender, and he, certainly, knew the very truth of the case. To this reasoning I do not accede. It is true that *Vaughan* himself was the lender, or, rather, one of the lenders of the money. But *Gardner*, who acted for *Jones* throughout the whole transaction, knew, from the very first, that the money was trust-money held by *Vaughan* and another as co-trustees. This is obvious from his letter to *Vaughan* of the 12th November 1839; when, speaking of the value of *Jones's* estate, he gives him information which he desires him to communicate to his co-trustee. He also knew, or, to use his own words in his answer to the 31st interrogatory, had reason to believe, previously to May 1840, that the money had been remitted to *Vaughan*. He must, therefore, have known that the co-trustee, that is to say, the Plaintiff, had, before that time, put the money into the hands of *Vaughan*, and, of course, that he had done so in order that it might be lent to *Jones* on his executing the mortgage. What *Gardner* knew I must treat *Jones* as knowing; and if, with this knowledge, *Jones* chose to execute the deed, and, thereby, enable *Vaughan* to satisfy the Plaintiff that he, *Vaughan*, had done what the Plaintiff had trusted him to do, I think that *Jones* must abide the consequences of his act.

On these grounds, I have come to the conclusion that the Plaintiff has established a right, as against the estate of *Jones*, to be treated as a mortgagee for the full sum of 2500*l*.

1851.

WEST

v.

JONES.

It may be proper, however, to notice one or two minor points made in argument for the Defendant, lest it should be supposed they have been overlooked. It was contended that the bill was framed on the supposition, not that *Jones* had, by his conduct in executing the deed incautiously, led the Plaintiff to act on the supposition that the money had duly come to his hands; but that he, or *Gardner* his agent, had wilfully permitted *Vaughan* to retain and misapply it. And no doubt there are many charges, in the bill, framed on this *hypothesis*, and introduced for the purpose of showing that *Jones* or *Gardner* had been privy or consenting to the misapplication of the money by *Vaughan*. It is due to the parties to say that the evidence wholly fails in establishing these charges; and, if the Plaintiff's title to relief had depended upon their being made out, his bill must have been dismissed. There is nothing to lead to the suspicion of any unfairness in the transaction. All parties relied on the solvency of *Vaughan*. I see nothing like bad faith on the part either of *Jones* or *Gardner*.

But the bill, it must be observed, besides the charges of specific misapplication of the money with the connivance of *Jones*, contains a general charge that the money was left, by *Jones*, in the hands of *Vaughan*, contrary to the usual course of business. The bill also charges, in substance, that if, in fact, the whole of the 2500*l*. was not paid, by *Vaughan*, to *Jones* or according to his direction, yet that *Jones*, by never calling on the

1851.

WEST

v.

JONES.

Plaintiff for the money, led him to suppose that it had been all duly advanced ; and these charges being all, as I think, fully made out in proof, seem to me to be quite sufficient to warrant the Court in granting the relief asked for.

Some reliance was placed, in the argument, on the conduct of the parties after the death of *Vaughan*. No attempt, it was said, was made, for above a year after that event, to fix *Jones* with the loss occasioned by *Vaughan's* insolvency ; and, on the contrary, those who acted for the Plaintiff seemed to admit that the loss must fall on him. On the part of the Plaintiff, it was answered that this was done under the assurance, made by *Vaughan's* family, that they would step forward to make good the loss, in order, thereby, to save the honour of their relation and protect his memory from obloquy. It is not necessary that I should decide how far this is made out. It is sufficient for me to say that the rights of the parties must be decided according to the facts of the case, and not according to the view of the legal and equitable consequences of those facts taken by the parties.

Another point made, or, at all events, glanced at in the argument for the Defendant, was that the relief (if any) to which the Plaintiff would be entitled, was not that he should be declared a creditor for the whole 2500*l.*, but only for so much as he might have recovered from *Vaughan*, if he had not been led, by *Jones*, to believe that the money had been all properly applied ; and the bill, it was said, is not framed with a view to any such relief. But, in a case like this, such a principle seems to me incapable of application. Where the complaint is that the Defendant has omitted to do

something which he ought to have done, there, it is essential, in order to establish the Plaintiff's title to relief, that he should show himself to have been injured by the omission complained of, and, therefore it was that, in *Styles v. Guy (a)*, Lord *Lyndhurst*, on a bill seeking to charge the Defendant, an executor, with a loss occasioned by his not having taken proceedings against a co-executor, directed an inquiry whether, if the Defendant had taken measures for calling in the money from his co-executor, it might have been recovered. But the foundation of the Plaintiff's complaint here, is not any omission on the part of *Jones*. The Plaintiff complains of an act done by *Jones*, whereby he was misled; whereby he was induced to act on the belief that a given state of facts existed which did not really exist. The Plaintiff says, "You, *Jones*, told me that *Vaughan* had paid the money to you, and I trusted to what you said." The *onus* in this case, even if the principle be at all applicable, would be not on the Plaintiff to show that, but for the execution of the deed by *Jones*, he could have recovered the money from *Vaughan*; but on the Defendants, to show that he could not. And this it would, obviously, be impossible to establish, considering that *Vaughan* lived for six months after the execution of the deed, and, for aught that appears to the contrary, in good credit.

I am, therefore, of opinion that the Plaintiff has made out his title to relief to the extent of being treated as mortgagee for the full sum of 2500*l.*; and the decree must declare him so entitled accordingly.

The only remaining question is that of the costs. The

(a) 4 Youn. & Coll., Exch. Cases, 571.

1851.

WEST
v.
JONES.

1851.

WEST

v.

JONES.

Plaintiff must clearly have the general costs of the suit. But a considerable part of the costs has arisen from the charges in the bill, whereby the Plaintiff has attempted to fix *Jones*, or *Gardner* as his agent, with knowledge of a connivance in the misapplication of the money by *Vaughan*. In these charges I think the Plaintiff has wholly failed; and I shall, therefore, in giving him his costs, except all costs occasioned by those charges; and I shall declare the Defendants to be entitled to all their costs occasioned by the introduction of such charges, to be set off against the Plaintiff's general costs of the suit.

1851 :

25th January

and

8th February.

*Creditor's suit.**Decree in a cre-**ditor's suit.**Proof of debt.*

FIELD v. TITMUSS.

THE bill was filed by a creditor, on behalf of himself and all the other creditors of a testator. The debt which the Plaintiff (who had been the testator's solicitor) claimed to be due to him, was 449*l.*, being the amount of an account, for business done and monies advanced, which the Plaintiff had delivered to the testator, and at the foot of which the testator had signed a memorandum

A suit was instituted by *A.*

on behalf of himself and all the other creditors of a testator, against the executor. The executor *disputed the Plaintiff's debt, but admitted that he had paid all the testator's debts which had come to his knowledge*, and also the legacies given by the will, and that he was the residuary legatee. The Plaintiff proved the debt; and, after the hearing of the Cause, contended that the decree ought to be prefaced with a *declaration* that he was a creditor on the testator's estate for the amount of his debt.

But the Court held that, notwithstanding the special circumstances of the case, the declaration ought not to be made, and that the Plaintiff was bound to prove his debt over again in the *Master's* office.

agreeing to pay interest at five *per cent. per annum* on the amount, until it should be paid.

1851.

FIELD

v.

TITMUS.

The answer *disputed the debt*, but admitted that the Defendant had paid all the testator's debts which had come to his knowledge *and the legacies* given by the will, *and that the Defendant was the residuary legatee*. It added, however, that the assets which the Defendant had possessed, were not sufficient to pay the testator's funeral and testamentary expenses and debts, *including the debt claimed by the Plaintiff*.

The Plaintiff, in consequence of his debt being disputed, proved, before the hearing of the Cause, that the signature to the memorandum was in the testator's handwriting. The Cause was heard on the 10th of December 1850. The minutes of the decree, as prepared on behalf of the Plaintiff, contained *a declaration, that the Plaintiff was a creditor, on the testator's estate, for the 449l.*, with interest thereon, at five *per cent.* from the date of the memorandum, and then directed the *Master* to take an account of what was due, to the Plaintiff, for principal and interest in respect of that sum, and of what was due to the testator's other creditors, and to compute interest on such of their debts as carried interest. *The Registrar*, however, struck out the declaration, and declined to draw up the decree otherwise than as directing the *Master*, in the usual way, to take an account of the debts due to the Plaintiff and the other creditors, and to compute interest on such of their debts as carried interest. In consequence of which, the Cause was placed in the paper for the minutes to be spoken to.

1851.

FIELD

v.

TITMUS.

Mr. *Bethell* and Mr. *R. K. E. Forster*, for the Plaintiff, disputed the correctness of the report of Lord *Cottenham's* judgment in *Owens v. Dickenson (a)*, and of the proposition, as a general one, in *Seton* on Decrees, page 55, that the Plaintiff, in a creditor's suit, having obtained a decree, must prove his debt over again in the *Master's* office ; and they distinguished the case of *Newman v. Norris (b)*, which Mr. *Seton* cited in support of that proposition from the present case. They added that, in a creditor's suit, where the personal representative of the deceased debtor, had not contested the Plaintiff's debt, and the Plaintiff obtained a decree, it was necessary for the Plaintiff, if the other creditors disputed his debt before the *Master*, to prove it over again in the *Master's* office ; but that no such necessity existed in a case like the present, where the debtor's personal representative had disputed the debt, and the Plaintiff had established it by evidence, and then obtained a decree ; for, they said, in such a case the debt *transit in rem judicatam* ; and the decree makes it equivalent to a judgment-debt.

Mr. *James Parker* and Mr. *Elmsley*, for the Defendant, contended that the decree ought to be drawn up in the usual form, as the *Registrar* had suggested. They said that there was a difference between a suit instituted by a creditor on behalf of himself alone, and a suit instituted, as the present suit was, by a creditor on behalf of himself and all the other creditors of the debtor : that, in the former case, if the debt was admitted or proved, the Plaintiff was entitled to a decree establishing his debt, which would be equivalent to a judgment ; but, in the latter case, the *forum* in which

(a) Craig & Phill. 48, see 56.

(b) 1 Dick. 259.

the demands against the debtor's estate were to be established, was the *Master's* office; and any creditor who came in under the decree, was at liberty to impeach the Plaintiff's debt, notwithstanding he had proved it before the hearing of the Cause. They relied on *Owens v. Dickinson* and *Whitaker v. Wright (c)* as conclusive authorities in their favour; and distinguished *Woodgate v. Field (d)* from the present case, on the ground that the Defendant in that case, had admitted assets. They concluded by observing that the evidence which the Plaintiff in this case, had entered into, would be evidence for him in the *Master's* office, but would not be conclusive evidence; and, therefore, that the declaration had been improperly introduced into the minutes.

1851.
FIELD
v.
TITMUS.

Mr. *Bethell*, in reply, referred to *Seton* on Decrees, page 84, and said that, in *Whitaker v. Wright*, no issue was raised, on the pleadings, as to the debt; and, therefore, the Plaintiff in that case, was not entitled to have any declaration introduced into the decree; but, here the debt had been contested, and the contest had been decided in the Plaintiff's favour; and that, in *Tomlin v. Tomlin (e)* also, (which Mr. *Parker* cited during the reply) no issue was raised as to the debt: that the Defendant in this case admitted that he had paid all the legacies given by the testator, which was equivalent to an admission of assets; and that he admitted also that he was the residuary legatee, and that all the testator's debts, except that due to the Plaintiff, had been paid; and therefore the Plaintiff and the Defendant were the only parties interested in the testator's estate.

(c) 2 Hare, 310, see 313
and 314.

(d) *Ibid.* 211.
(e) 1 Hare, 236.

1851.

FIELD

v.

TITMUSS.

8th February.

The VICE-CHANCELLOR :

In this case, the original suit was an ordinary creditor's suit, against the Defendant as executor of *William Titmuss*, the Plaintiff having been the solicitor of the testator in his lifetime. The debt on which the Plaintiff relied, was a written memorandum, subscribed by the testator at the foot of an account consisting of the amounts of several bills of costs ; and by which memorandum the testator admitted the correctness of the bills, and agreed to pay interest on the amount. The Defendant having, in his answer, disputed the debt, the Plaintiff examined several witnesses, who proved the testator's signature to the memorandum. There was no other evidence. The Defendant filed a cross bill impeaching the genuineness, or, at all events, the fairness of the document so signed or alleged to have been signed by the testator. But he did not go into evidence ; and the whole equity of the cross bill was denied by the answer. The two causes came on for hearing together ; and I was of opinion that the Plaintiff in the original suit, had made out his demand, so as to entitle him to a decree ; and that the Plaintiff in the cross suit had wholly failed. I, therefore, dismissed the cross bill with costs ; and the only question is what is the decree to which, under these circumstances, the Plaintiff is entitled ?

Mr. *Bethell*, on his behalf, contended that though, in general, the common decree in a creditor's suit, merely directs a general account of all debts, leaving to the Plaintiff, in common with other creditors, the obligation of establishing his demand in the *Master's* office, yet that the rule was different where the Plaintiff's demand has been disputed, as it was in this case, and established by evidence. But I find no authority for this distinc-

tion: and, on the contrary, Lord *Cottenham*, in *Owen v. Dickenson*, speaks of the obligation of the creditor to prove his debt over again before the *Master*, although he may have established it here, as being the settled practice of the Court. The words, "though he may have established it here," seem clearly to point to the case of its having been disputed by the executor: for, in every creditor's suit, the Plaintiff creditor must, of course, prove his debt; otherwise he would not be entitled to a decree at all: and it never was doubted but that, in an ordinary case, the Plaintiff, like every other creditor, must establish his debt in the *Master's* office. It was argued, indeed, that the language attributed to Lord *Cottenham* in the case I have referred to, could not really have been used by him. But I see no reason, so far, at all events, as relates to that part of the report, to doubt its accuracy: and it was afterwards relied and acted on by *Vice-Chancellor Wigram*, who had been Counsel in the Cause, in *Woodgate v. Field*, and some other cases; and is, so far as I can discover, in strict conformity with the general practice. I confess I was struck, at the hearing, with the argument that such a course is not to be reconciled with the general doctrine, which, in the absence of fraud or collusion, makes the executor, in any proceeding against him by one creditor at Law or in Equity, the sole party to sustain the rights of the other creditors who may be interested in resisting the debt sued for. If, for instance, in the present case, the Plaintiff had sued the executor at law and recovered judgment, that judgment would be conclusive proof of his debt in a subsequent suit for administering the assets. And I presume the same force must be attributed to a debt established by a decree of this Court in a suit by a single creditor suing on his own behalf only, not seeking a general account, but, merely,

1851.

FIELD

v.

TITMUS.

1851.

FIELD

v.

TITMUS.

proceeding to establish a demand, against the executor, to be paid, by him, out of the assets, in a due course of administration. And, reasoning by analogy from such cases, it is not obvious why the same force is not to be attributed to the proof of a debt in a suit for a general administration of the assets in payment of all the debts. But it may be observed that, in the latter case, what the Plaintiff asks is merely that an account should be taken of what is due to himself and the other creditors; and, then, that the assets may be applied, rateably, in discharge of all the demands. A decree, therefore, which should not oblige the Plaintiff to come in with the other creditors and prove his debt, would not be in conformity with the relief he asks for. It would be a decree placing him in a position different from that of the other creditors, made in a suit in which all he has asked is that he and the other creditors should all be put on the same footing. Whether this be the ground of the rule or not, I need not inquire. The principle and the practice seem to me to be perfectly well settled, and, therefore, the decree here must be the ordinary decree, directing the *Master* to take an account of what is due to the Plaintiff and the other unsatisfied creditors of the testator.

MACINTYRE v. CONNELL.

THE bill was filed by the secretary to the United Kingdom Life Assurance Company (for and on behalf of the Company) and by the trustees of that Company against *John Connell*, *George Webster*, and *Mark Boyd*, and certain other persons who were the directors and public officers of the Union Bank of *London*. It stated an Act of Parliament passed in the 4 Will. IV., by which the Assurance Company were enabled to sue and be sued in the name of one of their directors or their secretary; and that, on the 29th of November 1845, *Connell*, *Mark Boyd*, *J. W. Sutherland*, (who was a director,) *Webster* and *William Spratt Boyd* procured 10,000*l.* from the Company; and gave their joint and several promissory note for it, payable twelve months after date, to the trustees of the Company: that the 10,000*l.* was not paid when it became due: that the Company recovered judgments in three separate actions on the note, against *Connell*, *Webster*, and *Mark Boyd*, after the signing of which, and on the 10th of April 1850, a payment of 3000*l.* was made on account of the note. The bill then stated that there was a certain *public company*, called The Union Bank of *London*, established, in 1839, for the purpose of carrying on the business of bankers or of banking according to the provisions of a deed of settlement dated the 5th of April 1839, which provided that the capital of the Company should be 3,000,000*l.*, divided into 60,000 shares of 50*l.* each: That the capital of the Company should be used and employed in the business of the Company, and each of the proprietors should be entitled to the profits and liable to the losses of the Company in proportion to

1851:
15th & 22nd
January
and
1st March.

Public company
not in-
corporated.
Stat. 1 & 2
Vict. c. 110,
sect. 14.

A banking co-
partnership
which made re-
turns to the
stamp office
pursuant to 7
Geo. IV. c. 46,
held to be a
public company
not incorporated
within the
meaning of 1 &
2 Vict. c. 110,
sect. 14.

1851.

MACINTYRE

v.

CONNELL.

his share : That no benefit of survivorship should take place between the proprietors ; and all the real property of the Company should, as between the proprietors and their respective real and personal representatives, be considered as personal property and be transmissible as such : That the directors should have the management of the business and concerns of the Company, and should appoint such of their body as they should think fit, to be trustees of the property of the Company ; and that the trustees should be under the order and control of the directors : That the business of the Company should be carried on in the names of such of the trustees as the directors should appoint ; and all contracts, securities, estates and effects entered into, and taken or given on behalf of the Company, should be entered into, and taken or given by the trustees, unless the directors should otherwise direct ; and all suits respecting the property of the Company, should be carried on in the names of the trustees ; and that they should be removable at the pleasure of the directors : That the directors, if they should think it desirable, might apply for and obtain a charter of incorporation or letters patent from the Crown, for granting, to the Company, all or any of the powers or immunities which the Crown was or might be able to confer on trading or other companies ; and might obtain an Act of Parliament for better carrying on the business of the Company, either as a corporation or otherwise ; and that, for the purpose of obtaining such charter, letters patent, or Act, the directors might subject the proprietors to such individual liability, as to their persons and properties, as might be imposed by way of condition for obtaining the same charter, letters patent, or Act, and might comply with any conditions or restrictions that the Crown or Parliament might think proper to impose, notwith-

1851.
 MACINTYRE
 v.
 CONNELL.

standing the same might be inconsistent or at variance with the provisions of the now stating deed ; and that the directors might, by or out of the funds of the Company, defray the expenses incident to the application for such Charter, Letters Patent or Act, and to the procuring of the same in case the same should be procured, and with the view or for the purpose of bringing the Company within the provisions of the Act of Parliament then lately passed for the better enabling her Majesty to confer certain powers and immunities on trading and other companies : That the directors might purchase, for the use of the Company, any shares in it which might be offered for sale, and that the shares which should be so purchased, should be considered as part of the property and effects of the Company : That if any proprietor should do any act whereby he should become entitled to the benefit of any Act of Parliament for the relief of debtors, and by reason or in respect whereof an assignment of his estate and effects should be made for the benefit of his creditors, or if any order, judgment or decree should be made whereby the shares of any proprietor should be attached or affected, and of which the secretary or manager or any of the trustees should have notice, the proprietor by whom such act should be done, or whose shares should be attached or affected by such order, judgment or decree, should, upon the commencement and prior to the completion of the doing of such act or of the making of such order &c., forfeit his shares to the Company, and all profits then due or accruing due thereon, and all other rights and privileges in respect thereof, as from the commencement of the doing such act or of the making of such order &c. ; and such proprietor should cease to be a proprietor as from the commencement of the doing such act or of the making of such order &c., and the

1851.
 MACINTYRE
 v.
 CONNELL.

directors should cause such shares, profits, rights and privileges to be sold, and should pay the net produce thereof, after retaining the amount of any lien, to the assignees of the proprietor's estate, or to the person in whose favour such order &c. should be made: That it should be lawful, for any proprietor, or his legal personal representatives, to sell and transfer all or any of the shares held by him, provided the approbation of the directors to such transfer, should be first obtained, and provided the same should be testified by the execution of the deed of transfer by the secretary or some other officer of the Company.

The bill next stated that, previously to and at the time of making the orders thereafter mentioned, *Connell, Webster* and *Mark Boyd* held four hundred, twenty and thirty shares in the Company respectively: That, on the 13th of April 1850, Mr. Justice *Talfourd*, one of the Judges of the Court of Common Pleas at *Westminster*, made three orders nisi (which were subsequently made absolute) under the fourteenth section of the 1 & 2 Vict. c. 110, charging the shares of *Connell, Webster* and *Mark Boyd* with the sums for which the judgments had been recovered against them respectively:

That *Connell, Webster* and *Mark Boyd*, insisted that the Union Bank of London was not a public company existing in England within the meaning of the 1 & 2 Vict. c. 110, so as to entitle the Plaintiffs to all such remedies as they would have been entitled to, under that Act, in respect of shares in a public company; whereas the Plaintiffs charged that the Union Bank of London was a partnership whereof the capital was divided or agreed to be divided into shares, and so as to be trans-

1851.

MACINTYRE

v.

CONNELL.

ferable without the express consent of the co-partners; and that any number of strangers, might, with the consent of the board of directors, be introduced into the said Company, not only without the consent of the individual partners, but notwithstanding their express dissent: That the Union Bank of *London* immediately on the passing of the 7 & 8 Vict. c. 113, (to regulate Joint-stock Banks in *England*,) availed itself of the provision of that Act, whereby it was provided that every company of more than six persons established, on the 6th day of May 1844, for the purpose of carrying on the business of bankers within sixty-five miles from *London*, should have the same powers and privileges of suing and being sued in the name of one of their public officers, and that all judgments, decrees and orders made and obtained in any such suit, might be enforced in like manner as was provided with respect to such companies carrying on business beyond sixty-five miles from *London*, under the 7 Geo. IV. c. 46; provided the company should make out and deliver, to the Commissioners of Stamps and Taxes, the several accounts or returns required by that Act; and that the said Company had made out and delivered such accounts and returns: That the shares in the Union Bank of *London* had been, since the first establishment thereof, and were, as a matter of course, bought and sold on the Stock Exchange; and that the market price thereof had been and was periodically published in *Wettenhall's* share and stock lists. The bill prayed for a declaration that the judgments against *Connell*, *Webster* and *Mark Boyd*, were charges, respectively, upon their shares in the Union Bank of *London*, and that an account might be taken of what was due, to the Plaintiffs, in respect of such judgments, and that the other Defendants, the directors of the Union Bank, might be ordered to sell the said shares,

1851.

MACINTYRE

v.

CONNELL.

and to pay over, to the Plaintiffs, the proceeds thereof or so much as might be required, in or towards satisfaction of the said debt.

Connell demurred. The grounds stated on the record, were, first, want of equity:

And, secondly, because it appeared, by the Plaintiffs own showing, that *William Sprott Boyd* was a necessary party to the bill, inasmuch as it was therein stated that *William Sprott Boyd* did, together with *Connell, Mark Boyd, Sutherland and Webster*, make their joint and several promissory note for 10,000*l.* in the words and figures in the bill set forth, and, in respect of which promissory note, several judgments were, by the Plaintiffs, as was alleged in the bill, recovered, and in respect of which judgments, several Judge's orders, as in the bill alleged, were obtained, and which Judge's orders, as appeared by the bill, purported to charge, as in the bill was alleged, certain shares in the Union Bank of *London*.

Mr. *Stuart* and Mr. *Charles Webster* said, in support of the first ground of demurrer, that a public company was a company incorporated, either by Act of Parliament or by royal charter, for the purpose of carrying on an undertaking of a public nature: That the Union Bank of *London* was not incorporated, nor was it formed for the purpose of carrying on an undertaking of a public nature; but that it was a mere private banking co-partnership; and, therefore, the shares in it were not chargeable under the 14th section of the 1 & 2 Vict. c. 110.

Mr. *Bethell*, Mr. *W. M. James* and Mr. *Willes*, in

support of the bill, referred to 7 Geo. IV. c. 46, 1 & 2 Vict. c. 110, and 7 & 8 Vict. c. 113,* and said that in the view of the Legislature, every company was a public company of which the capital was divided into shares transferrable without the consent of *all the members of the company*; which might sue and be sued in the name of one of its public officers; and which made returns from which the names and places of abode of its members, and the state of its affairs, might be ascertained; and that the Union Bank of *London* had all those elements of publicity; and therefore it was a public company; and the shares in it were chargeable under the 14th section of the 1 & 2 Vict. c. 110. They cited *Graham v. Connell (a)*.

1851.
MACINTYRE
v.
CONNELL.

Mr. *Stuart* replied.

The VICE-CHANCELLOR.

1st March

The main question in this case, is whether the Union Bank of *London* is a public company within the 1 & 2 Vict. c. 110, s. 14. By that section it is enacted that, if any person against whom any judgment shall have been entered up in any of her Majesty's superior Courts at *Westminster*, shall have any Government stocks, funds or annuities, or any stock or shares of or in any public company in *England* (whether incorporated or not) standing in his name in his own right, or in the name of any other person in trust for him, it shall be lawful for a Judge of one of the superior Courts, on the application of any judgment-creditor, to order that such stock, funds, annuities or shares, or such of them or such part thereof

* The sections of these Acts, relevant to the question raised by the demurrer for want of equity, are fully stated in the Judgment.

(a) 19 Law Journ. N. S., 361 Excheq. Cases.

1851.

MACINTYRE

v.

CONNELL.

respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment-creditor to all such remedies as he would have been entitled to if such charge had been made, in his favour, by the judgment-debtor. The present bill was filed by *Patrick Macintyre*, the secretary of the United Kingdom Life Assurance Company, on behalf of the Company, and also by certain other gentlemen who are trustees of the property of that Company, which was established by a private Act of Parliament passed in the 4 Will. IV.

The statement in the bill is that a certain promissory note, dated in November 1845, was made by *John Connell*, *Mark Boyd*, *John William Sutherland*, *George Webster* and *William Sprott Boyd*, and, by them, given to the former trustees of the society, to secure a sum of 10,000*l.* due from them to the Insurance Office ; and that the note was not paid, and an arrear of interest accrued due thereon. The bill, therefore, is filed by the secretary of the Insurance Company and the trustees of that Company as the holders of the promissory note ; and it states that there is a certain public company called the Union Bank of *London*, established, in the year 1839, for the purpose of carrying on the business of bankers or of banking upon the terms and subject to the covenants, rules, regulations and provisions contained in a certain indenture or deed of settlement dated the 5th of April 1839 &c. &c. And it prays &c.

The Defendant, *Connell*, who is the holder of four hundred shares in the Union Bank of *London*, has demurred to the bill in this way &c. &c.

Now, that being the state of the record, the question, as I stated before, is whether the Union Bank of *London* is a public company within the statute of Victoria which I have referred to.

1851.
MACINTYRE
v.
CONNELL.

The real difficulty which arises on this subject, is that the statute speaks of a public company whether incorporated or not, as being something known to the law, that is, as if it were something that, when mentioned, a Court could be able to say, *ex cathedra*, This is or is not a public company; there being, in truth, no such legal term known as a public company not incorporated. Then the question is, there being no legal meaning to the term, "public company," how are the Courts to interpret that term? because it would be very improper to say that the Legislature has used words that could have no meaning; and therefore, we must find out, as well as we can, what meaning is to be attributed to the words. And that must be ascertained by discovering what the state of the law was, in respect of companies, at the time of the passing of the Act of the 1 & 2 Vict.; because it must be with reference to the then state of the law, that the question is to be determined; and not by the state of the law at any subsequent period, although, perhaps what passed subsequently, may enable us to interpret, in some degree, the language used by the Legislature upon a prior occasion; but it cannot, of itself, give us the meaning.

Now it appears to me, having looked at the matter with some care, that there were only two classes of companies to which, by possibility, at that time, the expression, "public company not incorporated," could apply. What was the state of the law at that time? In the first place, there was the statute of the 7 Geo. IV.

1851.

MACINTYRE

v.

CONNELL.

c. 46, for the better regulating copartnerships of certain bankers in *England*. It is well known that, prior to that Act, nowhere within her Majesty's dominions, at all events, nowhere in *England*, could more than six persons associate together for the purpose of carrying on the banking business. The Bank of *England* were interested in sustaining that privilege upon their part. They had advanced large sums of money to the Government; and their remuneration, in part, was that they were to have a monopoly in banking, except where there should not be more than six partners. But that monopoly was restricted, in the first instance, by the Act to which I have alluded, the 7 Geo. IV. c. 46, which enabled partnerships consisting of more than six members, to carry on the business of bankers, provided only they carried it on sixty-five miles or upwards from *London*; and provided they carried it on under the restrictions and in the manner provided by that Act of Parliament, which were that they should make regular returns of the names of all the partners to the stamp office. That list was to be amended, from time to time, when a transfer of the shares took place; and they were to return, to the stamp office, the names of two or more persons to be called the public officers of the bank; and parties having claims upon the bank, were not to sue the bank as a partnership, according to the ordinary rule of common law, but were to sue the public officers instead; and those public officers were, for the purposes of the Act, to represent the company. On the other hand, if the copartners had any claims against third parties, they were to sue, not in the ordinary mode in which partnerships, independent of that Act, would sue; but by their public officers; and the effect of a judgment against the public officer, was that you might take out execution under it against the partnership and every

member of it. Now that Act was in force at the time of the passing the 1 & 2 Vict. c. 110. In the year 1833 the 3 & 4 Will. IV. c. 98, was passed, and, by it, banking copartnerships consisting of more than six members, were permitted to carry on business in *London* or within sixty-five miles of it, on certain terms. Now let us see whether there were any other companies to which the language of the 1 & 2 Vict. c. 110, can be held to apply. There certainly was one other class of trading companies; because, by the Act which was passed in 1837, namely, the 7 Will. IV. & 1 Vict. c. 73, intituled, "An Act for better enabling her Majesty to confer certain Powers and Immunities on Trading and other Companies" power was given, to the Crown, not to incorporate partnerships, but to grant them privileges which, by common law, would not be granted; namely, to trade under liabilities to a certain degree restricted. The principal provisions of that Act, are these:—The second section enacts that it shall be lawful for her Majesty, by letters patent, to grant, to any company or body of persons associated together for any trading or other purposes, although not incorporated by such letters patent, any privileges or privilege which, according to the rules of the common law, it would be competent, to her Majesty, to grant to any such company or body of persons in and by any charter of incorporation. The next section is: "And be it enacted that, in any such letters patent so to be granted as aforesaid by her Majesty to any such company or body of persons so associated as aforesaid but not incorporated, it shall and may be lawful, in and by such letters patent, either expressly or by a general or special reference to this Act, to provide and declare that all suits and proceedings, whether at law, in equity, or in bankruptcy or sequestration, or otherwise howsoever, as well in *Great Britain* and *Ireland* as in

1851.
 MACINTYRE
 v.
 CONNELL.

1851.

MACINTYRE

v.

CONNELL.

the colonies and dependencies thereof, by and on behalf of such companies or body, or any person or persons as trustee or trustees for such company or body, against any person or persons whether bodies politic or others, and whether members or not of such company or body, shall be commenced and prosecuted in the name of one of the two officers for the time being appointed to sue and be sued on behalf of such company or body, and registered in pursuance of the directions of such appointment and registration respectively hereinafter contained; and that all suits and proceedings, whether at law or in equity, by or on behalf of any person or persons, whether bodies politic or others, and whether or not members of such company or body, shall be commenced and prosecuted against one of such officers, or, if there shall be no such officer for the time being, then against any member of such company or body: Provided nevertheless that nothing in this Act or in such letters patent contained or to be contained, shall prevent the plaintiff from joining, any member of such company or body, with such officer, as a defendant in equity, for the purpose of discovery or in case of fraud." The 4th section is: "And be it enacted that it shall and may be lawful, in and by such letters patent so to be granted to any such body or company as aforesaid, to declare and provide that the members of such company or body, so associated as aforesaid, shall be individually liable, in their persons and property, for the debts, contracts, engagements and liabilities of such company or body, to such extent only per share, as shall be declared and limited by such letters patent; and the members of such company or body, shall, accordingly, be individually liable for such debts, contracts, engagements and liabilities respectively, to such extent only per share as, in such letters patent, shall be declared and limited; such liability, nevertheless, to be enforced in such man-

ner and subject to such provisions as are hereinafter contained." Then the 5th section says: "And be it enacted that every such company or body to which any such privileges or powers as hereinbefore mentioned shall be granted under the authority of this Act, shall be entered into or formed by a deed of partnership or association, or an agreement in writing of that nature; and the undertaking shall, by such deed or agreement, be divided into a certain number of shares to be there specified; and, in such deed or agreement, or in some schedule thereto, there shall be set forth the name or style of the said company or body, the names or styles of the members of the said company or body, the date of the commencement thereof, the business or purpose for which the said company or body is formed, and the principal or only place for carrying on such business; and, in such deed or agreement, there shall also be contained the appointment of two or more officers to sue or be sued on behalf of such company or body in manner hereinafter mentioned." And then, just in the same way as in the Bank Act of the 7 Geo. IV., a return is to be made, to certain public officers, of the names and addresses of the members, and the number of the shares they respectively hold; and that is to be renewed, from time to time, as changes take place. And there is a great number of other clauses, but I am not aware that it is necessary to advert to them for the present purpose. That, therefore, was a class of companies not incorporated, or which might come under the description of public companies not incorporated, which existed at the time of the passing of the 1 & 2 Vict. c. 110. Now those two classes are, so far as I can discover, the only two classes of companies not incorporated, to which the Act of Vict. can, by possibility, refer. I mean banking companies existing under the 7 Geo. IV. c. 46, and the sub-

1851.

MACINTYRE

v.

CONNELL.

1851.

MACINTYRE

v.

CONNELL.

sequent extension of that Act by the Act passed in the year 1833, the 3 & 4 Will. IV. c. 98, and companies associated for trading or other purposes, having letters patent granted by the Crown, but not incorporated. And it seems to me, if those were the only two classes, that either one or both of them must be the class or classes to which the Act of Vict. refers. That the words, "public company not incorporated," would be applied, properly, to the last class, seems to me to admit of no doubt. The names of the members and of the officers who are to sue and be sued on behalf of the company, the objects of the society, and many other particulars relating to it, are to be enrolled, and, thereby, made public. Therefore, it seems to me to be impossible to doubt that such a company would be a public company not incorporated within the meaning of the Act of Vict. Then the question is whether there is any real distinction, whatever, between that which I assume must be taken to be a public company not incorporated within the meaning of the Act of the 1 & 2 Vict., and a banking company acting under the law that was then in force, namely, the 7 Geo. IV. c. 46, and the 3 & 4 Will. IV. c. 98. I see no real distinction between the two. It is true that the banking company was not a banking company carrying on its operations under the provisions of a charter or letters patent not incorporating them; but all the attributes of publicity appear to me to exist as well in the one case as in the other. The names of the members are all enrolled, with their addresses, and every transfer of interest is enrolled; and the company is to sue and be sued by public officers, just in the one case as in the other; and it seems to me that, in the absence of a legal definition, I must treat the one case to be just the same as the other; that that which was the attribute of publicity in a trading company *quasi* incorporated

under the statute of the 7 Will. IV. & 1 Vict. c. 73, was the attribute of publicity in the case of a banking partnership. In my opinion, the two cases are undistinguishable ; and the one being, as I assume it must be taken to be, within the meaning of the Act of the 1 & 2 Vict., the other must be taken to be so likewise.

1850.
 MACINTYRE
 v.
 CONNELL.

It does not appear that, in the case of banking companies, it is at all necessary that their capital should be divided into shares ; although, with respect to companies *quasi* incorporated under the 7 Will. IV. & 1 Vict., it is necessary that their capital should be divided into shares, and should be transferrable. But, in point of fact, the capital of the Union Bank of *London* is divided into shares. I do not, however, think I can hold the Union Bank of *London* to be a public company within the meaning of the 1 & 2 Vict., merely, because its capital is divided into shares. In my opinion, it would have been a public company if its capital had not been so divided ; because the attributes of publicity would exist, namely, the return of the names and places of abode of the members from time to time, and of the officers appointed to sue and be sued on behalf of the company.

There was another ground that was relied upon as showing that this was a public company ; which I confess I do not pay much attention to. It was this : that the Joint-stock Companies Registration Act, 7 & 8 Vict. c. 110, defines a joint-stock company to be a company, the shares in which are transferrable without the express consent of all the members ; and it was said that this company is a joint-stock company according to that definition ; and so I think it is : but I do not rely

1851.

MACINTYRE

v.

CONNELL.

upon that: I advert to it merely to show that the observation did not escape me.

Then, a minor objection that was raised, was this. The statutes about bankers are confined to banking co-partnerships carrying on their business in *England*; and it was said that, upon a demurrer, it must appear that this was a banking company carrying on its business in *England*, and that there is no averment, in the bill, to that effect. Now that objection, I should be very much inclined to say, would be a good objection and would be fatal, if it were not discoverable, from the bill, that this banking company is carrying on its business in *England*. I do not allude to its being called The Union Bank of *London*. That does not necessarily import that it is carrying on its business in *England*; for there may be a bank in *Glasgow* or *Dublin* calling itself the Union Bank of *London*. But does it not appear clear that it is not only called the Union Bank of *London*, but that it carries on its business in *England*? I think it does, and for this reason; by the 47th sect. of the 7 & 8 Vict. cap. 113, which is An Act to regulate Joint-stock Banks in *England*, it is provided that, after the passing of this Act, every company of more than six persons established, on the 6th of May 1844, for the purpose of carrying on the trade or business of bankers within the distance of sixty-five miles from *London* and not within the provisions of this Act, shall have the same powers and privileges of suing and being sued in the name of any of the public officers of such co-partnership as the nominal Plaintiff, Petitioner or Defendant on behalf of such co-partnership, and that all judgments, decrees and orders made and obtained in any suit, may be enforced in like man-

1851.
MACINTYRE
v.
CONNELL.

ner as is provided with respect of such companies carrying on the said trade or business at any place in *England* exceeding the distance of sixty-five miles from *London* under the provisions of the 7 Geo. IV. c. 46; provided they make out and deliver, to the Commissioners of Stamps and Taxes, the accounts and returns required by the last-mentioned Act. And the bill contains this averment: that the Union Bank of *London*, immediately upon the passing of the Act of the 7 & 8 Vict., intitled, "An Act to regulate Joint-stock Banks in *England*," that is to say, in the year 1844, availed itself of the provisions of that Act, whereby it was provided, &c., referring to the clause in question. Now they could not avail themselves of the provisions of that Act unless they were a banking company carrying on business within sixty-five miles of *London*: and therefore that objection cannot prevail.

I have now disposed of the demurrer on the record, so far as it is a demurrer for want of equity.

Then the demurrer goes on to allege, in substance, that *William Sprott Boyd* who was one of the co-makers of the note was a necessary party to the suit. I think that is wholly untenable; because, upon looking at the 32nd General Order of August 1841, it seems as if it were made with reference to this very case. It says that where several persons are liable to the Plaintiff, the Plaintiff may proceed against one or more of them as he may think fit: therefore that disposes of the only other ground of demurrer on the record.*

* See the report of a demurrer *ore tenus*, *post*, page 252.

1851 :
10th and 12th
February.

Will.
Construction.
Family.

Lucas v. Goldsmith & W.R. 759
IN THE MATTER OF THE TRUSTEES RELIEF
ACT, AND OF

THE TRUST OF THE RESIDUARY PERSONAL ESTATE OF ROBERT PARKINSON, DECEASED.

EX PARTE ANN THOMPSON AND OTHERS.

Testator bequeathed the residue of his personal estate to trustees, in trust for his wife, during her widowhood, and, after her death or second marriage, in trust to be divided, share and share alike, among his five sisters *and their respective families*, if any.

Held that each sister *and her children living at the testator's death*, were entitled, in remainder expectant on the death or second marriage of the widow, to one-fifth of the residue, as joint tenants.

ROBERT PARKINSON, by his will dated the 12th of March 1808, bequeathed his residuary personal estate to his father, *Robert Parkinson* and to *Richard Rawes*, in trust to pay the interest to his wife, *Agnes Parkinson*, during her widowhood, and, on her death or second marriage, the principal to be divided, share and share alike, among his five sisters, *Elizabeth, Ann, Isabella, Dorothy, and Emma, and their respective families*, if any.

The testator died in September 1808. His widow and sisters survived him. His sister *Elizabeth* married and had children, but neither she nor her husband nor their children had been heard of for many years. *Ann*, who was one of the petitioners, married in 1800, and had two children, both of whom were still living. The testator's three other sisters were dead. *Isabella* married *William Steel* and had three children all of whom were dead, but some of them left children who were still living. *Dorothy* married in 1801, and had several children, some of whom were still living. *Emma* married in February 1808, and had children, all of whom, except one, were dead and died unmarried. The

survivor too was unmarried. *Rawes* survived his co-trustee, and died in February 1849. The testator's widow died in July following, without having married a second time.

1851.
PARKINSON'S
TRUST.

The testator's residuary estate consisted of 35*l.* stock : and *Rawes's* executors having transferred it into Court, the petition was presented by the testator's sister *Ann*, the personal representative of his sisters *Isabella* and *Dorothy*, and the only surviving child of his sister, *Emma*, praying that the stock might be sold and one-fifth of the proceeds paid to each of the Petitioners.*

The petition now came on to be heard.

Mr. *Phillips*, for the Petitioners, contended that the words : "and their respective families, if any," were to be rejected as surplusage.

Mr. *Elderton*, for the children of the testator's sisters who were born after the testator's death, contended that each of the sisters took one-fifth of the fund, for life, with remainder to her children.

Mr. *Shebbeare*, for the children born before the testator's death, contended that each sister and her children who were living at the testator's death, took one-fifth of the fund, as joint-tenants.

Mr. *Nalder* appeared for *Rawes's* executors.

* Neither the petition nor the affidavit in support of it, stated whether any of the children of the testator's sisters were born before the testator's death, or any other date or fact than is mentioned in the statement of the case.

1851.

PARKINSON'S
TRUST.

12th February.

The cases cited, are mentioned and observed upon in the judgment.

The VICE-CHANCELLOR :

This petition was presented under the late Act for the relief of trustees. The question arises under the will of a testator named *Robert Parkinson*, dated so long ago as the 12th of March 1808, and who died a few months afterwards. By that will, the testator, after giving several legacies, goes on to say: "Item, I further declare my will and mind to be that my said executors and trustees, *Robert Parkinson* and *Richard Rawes*, shall and do, after paying out the aforesaid legacies, at the expiration of one year after my decease, lend out the residue and remainder of my said personal estate and effects, after having paid off all my just debts, funeral expenses and probatory fees, to good or reputed good security or securities, the interest annually arising from which principal sum or sums, to be paid, annually, to my dear wife, *Agnes Parkinson*, so long as she shall continue my widow and in a state of chaste viduity, and, at her decease or her sooner nonconformity to the said last-mentioned clauses and injunctions, the said principal sum to be equally divided, share and share alike, among my five sisters, *Elizabeth*, *Ann*, *Isabella*, *Dorothy* and *Emma*, and their respective families, if any." Then there was a proviso in case his wife died leaving a child, which event did not ultimately occur.

The testator died soon after the date of his will. His wife lived until 1849; and, on her death, the residue became distributable. And the question now is who is entitled to it? One of the trustees died long ago; but the other lived until a comparatively recent period; and the fund was transferred into Court by his executors.

There is no doubt that the persons entitled are those persons who can claim as being the five sisters and their respective families, if any.

1851.
PARKINSON'S
TRUST.

In the first place, I think that the will is to be read just as if the testator had directed the residue of his personal estate to be disposed of, after the death or second marriage of his widow, in the following manner; that is to say, one-fifth to his sister *Elizabeth* and her family, if any, and so on.

Now three constructions were contended for: first of all, on the part of the Petitioners, who represent the five sisters, the contention was that the gift must be read as if it had been to the five sisters; and that the words, "family, if any," should be rejected as being surplusage. Mr. *Elderton* contended, on behalf of all the children of the sisters, that the true construction was that each of the sisters took an estate for life, with remainder to their children. And Mr. *Shebbeare*, on the part of the children who were born at the death of the testator, contended that the true construction was that it was a gift to the widow for her life, with remainder, as to one-fifth, to the testator's sister, *Elizabeth*, and her children living at the testator's death, as joint-tenants; as to another fifth, to *Ann* and her children living at the same time, as joint-tenants, &c. &c., that is to say, that each sister and the children of that sister who were living at the testator's death, took one-fifth as joint-tenants. Mr. *Phillips* alone contended that the words, "and their families, if any," must be rejected; and he relied, particularly, on *Robinson v. Waddelow* (a), before the late Vice-Chancellor of England, in which he distinctly rejected the words, "and their husbands and families," as incapable of

(a) 8 Sim. 134.

1851.

PARKINSON'S
TRUST.

being construed. I cannot say that that case is quite satisfactory to my mind; but I think that it is sufficient to say that the decision turned, very much, on the specialty of the language of the will in that case. At all events, it is not a case at all strictly analogous to the present; and I do not think I can act upon it. Mr. *Phillips* suggested that there was no case in which the Court had given effect to the words, "and their families," when coupled with a gift to the parents. There are, however, cases in which the Court has put a construction on the word, 'family,' and held it to mean, 'children,' as it does in common parlance. I allude to *Barnes v. Patch* (b) and *Wood v. Wood* (c). That the testator here used the word in that sense, is quite obvious; for none of his sisters had been married longer than seven or eight years, and one of them had been married only a month, and another was not married at all; and, therefore, none of them could have any family except children, and two of them might not have even a child; which accounts for his saying, 'if any.' The question then is whether the word, 'family,' becomes incapable of interpretation when the bequest is a bequest to the parents and their families? I cannot see any reason for that. And, in *Woods v. Woods* (d), Lord *Cottenham* held that a gift to a woman, towards her support and her family, gave the children an interest. He did not suppose that the children were necessarily excluded, because the gift was coupled with a gift to the parent: and in *Beales v. Crisford* (e), the late *Vice-Chancellor of England* held the same thing. But the will in that case was so strangely worded, that it is hardly an authority for anything. I do not think, however, that I can reject these words, as being incapable

(b) 8 Ves. 604.

(d) 1 Myl. & Cr. 401.

(c) 3 Hare, 65.

(e) 13 Sim. 592.

of interpretation. On the contrary, I think that it is perfectly obvious that what the testator meant was: "my sisters and their children:" he meant to include the children.

1851.
PARKINSON'S
TRUST.

Mr. *Elderton* contended that the testator had, in effect, said: "I give to my sisters for their lives, and, after their deaths to all their children:" but my answer to that is that that is not what the testator has said. The only authority appearing to support that view of the case, was a case before *Vice-Chancellor Knight Bruce* about a year ago, of *Froggett v. Wardell* (f): but I cannot rely on that case: and the learned Judge who decided it would be the last to say that it is a decision which governs this case. It turned on the special circumstances of the case: and, like *Robinson v. Waddelow*, it cannot govern any other case.

The result of my consideration of this question, is that the property must be divided into fifths, and that each of the sisters and such of her children as she had living at the death of the testator, are entitled to take one-fifth, as joint-tenants.

Declare that each sister of the testator, together with the children that she had, if any, living at the death of the testator, became entitled, expectant on the decease of the widow, to one-fifth of the residuary estate. And, the trustees undertaking to dispose of four-fifths of the fund according to that declaration, let those four-fifths be re-transferred to them; and let the remaining fifth be carried over to the account of the testator's sister, *Elizabeth*, and her family, if any.

1851 :
20th January.

*Joint-stock
companies
winding-up
Acts.
Creditor.*

IN THE WINDING-UP OF THE DIRECT WEST-END AND CROYDON RAILWAY COMPANY.

EX PARTE LLOYD.

The registered secretary to a provisionally registered Company, in pursuance of instructions given to him at a meeting of the members or committee of the Company, gave orders to an advertising agent to cause the scheme, &c. of the Company to be advertised. The agent executed the orders, and paid for the advertisements; and afterwards claimed, before the *Master* charged with the winding-up of the Company, to be admitted a creditor of the Company for the amount paid by him; but he did not know the names of the persons present at the meeting. The *Master* declined to admit the claim as a proof, because the affidavits in support of it, did not establish a debt against any particular persons or against the whole class of contributories: and the Court, on appeal, confirmed the *Master's* decision.

LLOYD, an advertising agent, claimed, before the *Master* charged with the winding-up of the above-mentioned provisionally registered Company, to be a creditor for 779*l.*, being the balance of an account due to him, from the Company, for advertising and causing to be advertised divers advertisements and public announcements in divers newspapers, at the request of the Company. It appeared that all the orders for the advertisements were given to him *by the registered secretary to the Company*; and that general instructions and authority had been given, to the secretary, at a meeting of the members or a committee of the Company, to duly advertise the scheme, proceedings and requisitions of the Company; *but the names of the persons who were present at that meeting, were wholly unknown to Lloyd*, and therefore the *Master* considered that he had not established a debt against any particular persons, or against the whole class of contributories, and declined to admit the claim as a proof, but admitted it as a claim.

The Court was now moved, on *Lloyd's* behalf, that the *Master* might be ordered to admit the claim as a proof. Mr. *Rolt* supported the motion, and Mr. *Bethell* opposed it, for the official manager.

1851.
EX PARTE
LLOYD.

Mr. *Rolt* said : The list of contributories is not yet finally settled ; and the *Master* seems to have considered that as my client had not shown that every person whose name might be put on the list, gave the order for the advertisements, he could not admit the claim as a debt. No doubt the *Master* may, as in bankruptcy, admit what may ripen into a debt, as a claim ; but he must admit every thing that is a debt, as a debt, and not as a claim. *Lloyd* caused the advertisements to be published, in consequence of orders given to him by the registered secretary of the Company ; and the Company authorized their secretary to give the orders ; therefore, we have fixed a debt upon the Company.

The *Vice-Chancellor*.—Provisionally registered companies are not *quasi* corporations. They are merely associations of individuals formed for a particular purpose. You must show which of those individuals are liable to you.

Mr. *Rolt*.—They are associations acting together for a common object, and having a common officer, who, in the ordinary course of business, acts on their behalf, and whose acts bind them. The creditors are not to determine who constitute the association, or in what proportions the members of it are liable to the debts. Those matters are left for future consideration. The debts are to be ascertained first, and then the contributories ; as appears from the Winding-up Act of 1848, where the seventy-first and four following sections relate, exclu-

1851.

EX PARTE
LLOYD.

sively, to debts, and the seventy-sixth begins to give directions as to contributories. See also the 28th sect. of the Act of 1849.

Mr. Bethell:—*Mr. Lloyd* seeks to have his claim admitted as a debt of the whole body of contributories: but only those members of the provisional committee who were present at the meeting at which the secretary was authorized to give the orders for the advertisements, are liable to him; and, as he was unable to show which of the members were present at that meeting, the *Master* was right in admitting his claim, merely as such. The 84th sect. of the Act of 1848, empowers the *Master* to make calls on individual contributories, so far as they may be liable to pay the same; and all that the Court can now do, is to allow *Mr. Lloyd* to go back, to the *Master*, and point out the persons who are liable to him.

Mr. Rolt replied.

THE VICE-CHANCELLOR:

The *Master* was quite right in not admitting *Mr. Lloyd's* claim as a proof; for, if he had admitted it as a proof, he would have decided that the whole body of contributories was liable to *Mr. Lloyd*. The only question is whether he has not done too much in admitting it as a claim.

Provisionally registered companies are not companies in the proper sense of the word: they are merely associations of individuals; and their liabilities must be dealt with as the liabilities of individuals. The Legislature, it is said, has spoken of such associations, as companies; but, though the Legislature may declare the law by enactment; yet they are not interpreters of the law:

and Courts of Justice are not bound by a mistake of the Legislature, as to what the existing Law is. This was so decided by the Court of King's Bench in *Dore v. Gray* (a). If the framers of these Acts thought that associations like that in the present case, are companies, they thought wrong. The members of such associations may not be jointly liable for any single act that has been done in effecting the object for which they were formed. Each of them is liable only for the debts which he, either individually or in conjunction with some other member or members, has authorized to be incurred. Therefore, it would be quite improper for the *Master* to admit debts, (as Mr. *Rolt* has contended he ought,) *de bene esse*; for that might be admitting debts which had no existence. If the debts claimed exist at all, they must be due from some one or more of the contributories; and the *Master* is bound, before he admits a claim as a debt, to require the claimant to show him that the parties who gave the order in respect of which the claim is made, or some of them, have been ascertained to be contributories.

I am of opinion that what the *Master* said, in this case, is substantially accurate; and, I shall refuse the motion, with costs.

(a) 2 T. R. 358.

1851.

EX PARTE
LLOYD.

1851 :
4th and 5th
March.

*Parties and
Pleading.*

MACINTYRE v. CONNELL.

SEE *ante*, page 225.

A. filed a bill against B. and the public officer of a banking company, seeking to make cer-

tain shares which B. held in the bank, available to the payment of a debt due to him from B. The bill alleged that, though the company had a prior charge, on the shares, for a debt due to them from B., yet that debt was amply secured by the shares

of other persons in the bank, and by other securities held by the company; and it prayed that *an account might be taken of what was due to the company* in respect of their charge; and that directions might be given for the satisfaction thereof out of the last-mentioned shares, and out of or by means of the other securities held by the company, or for enabling A. to pay, to them, the amount of their charge, and, thereupon, *to have such other securities assigned to him*; and, that the securities might be marshalled, so as to give the Plaintiff the benefit of his charge.

A demurrer, because the persons who had pledged their shares and given securities, to the company, for B.'s debt, were not made parties to the bill, was allowed.

A bill contained a charge with a view to discovering who certain persons, who were interested in the relief, were; but it did not allege that the Plaintiffs did not know who they were; and, therefore, a demurrer because they were not made parties, was allowed.

The Defendants assigned a third cause of demurrer, *ore tenus*, which renders a further statement of the contents of the bill necessary.

The bill alleged that the Union Bank of *London* pretended that *Connell, Webster* and *Mark Boyd*, were justly and truly, within the true intent and meaning of the provisions of the deed of settlement, respectively indebted, to the bank, in sums of money exceeding the values of their respective shares; and that, in respect of such debt, the bank was entitled to have a lien or charge on such shares respectively: but the Plaintiffs charged the contrary thereof to be true, and, that, although there was some debt due to the said company from *Connell, Webster* and *Mark Boyd*, yet the same was a

debt due from all of them, and from a great number of other persons, shareholders in the bank, and others ; and the banking company's debt was amply secured by the shares of such other persons, and by other securities for the same debt which the company held : and so it would appear if the Defendants would set forth what the debt or debts was or were in respect of which the said company claimed such lien on the said shares respectively, and how and in what character, and under what circumstances the same was or were contracted ; and, in particular, whether the same was or were due or alleged to be due from them, *Connell, Webster* and *Mark Boyd* respectively, individually, or from them as members of any firm, company or partnership, or jointly with any other individual or individuals ; and how the said banking company alleged that the said lien arose or was created ; and also what other persons or person the said banking company had liable to it for such debts or debt, and what securities or security, liens or lien it held for the same.

And the bill prayed that the directors of the bank might be ordered to sell the shares of *Connell, Webster* and *Mark Boyd* in the bank, and to pay over the proceeds or so much as might be required, in or towards satisfaction of the debt due to the Plaintiffs ; and, if it should appear that the banking company had any lien or charge upon the said shares or any of them, prior to the Plaintiffs' charge thereon, then that an account might be taken of what was so due to them ; and that proper directions might be given for the satisfaction thereof out of the said shares, and out of or by means of the other securities held by them, or for enabling the Plaintiffs to pay, to the banking company, the amount of such charge, and to have assigned to them, thereupon, the

1851.
 MACINTYRE
 v.
 CONNELL.

1851.
 {
 MACINTYRE
 v.
 CONNELL.

said several securities held, by the banking company, for the same; and that proper directions might be given for marshalling the said securities, so as to give, to the Plaintiffs, the benefit of their said charge upon the said shares.

The cause of demurrer assigned *ore tenus*, was that the persons who were liable to the banking company, or had given securities to it for the debt due from *Connell*, *Webster*, and *Mark Boyd*, were necessary parties, but were not made parties to the bill.

Mr. *Bethell* and Mr. *James* said that the demurrer *ore tenus* could not be sustained: First, because the bill alleged that the debt due to the bank from *Connell*, *Webster* and *Mark Boyd*, was amply secured on other property than the shares of those Defendants in the bank, and it merely sought to compel the banking company to have recourse to that other property for payment of the debt owing to them by *Connell*, *Webster* and *Mark Boyd*, and to leave untouched the bank shares of those Defendants, which were the only property that the Plaintiffs could have recourse to for payment of the debt due to them: *Aldrich v. Cooper* (a), where Lord *Eldon* said: "But the Court has said, and the principle is repeated, very distinctly, in *The Attorney-General v. Tyndal*, that, if a creditor has two funds, the interest of the debtor shall not be regarded, but the creditor having two funds, shall take to that which, paying him, will leave another fund for another creditor:" Secondly, because the bill sought to discover who the persons alleged to be necessary parties were; and, therefore, it would be absurd to allow a

(a) 8 Ves. 382, see 391.

demurrer because those persons were not made parties : and, Thirdly, because, *Connell*, the debtor, and not the bank, was the demurring party, and it did not lie in his mouth to make the objection for want of parties.

1851.
MACINTYRE
v.
CONNELL.

Mr. *Stuart* said that the bill did not allege that the Plaintiffs did not know who the persons alleged to be necessary parties were ; and that *Connell* was as much entitled, as the bank was, to make the objection for want of parties.

The VICE-CHANCELLOR :

This objection for want of parties, seemed to me, at first, to be a valid one ; and the more I have considered it, the more weight it has seemed to have ; and my final impression is that it must prevail. Three answers were given to it : two by Mr. *Bethell*, and one by Mr. *James*. Mr. *Bethell's* first answer was that the Plaintiffs sought to take, from the banking company, only one of the funds on which the debt due to them from *Connell*, *Webster* and *Mark Boyd*, was charged, they having other ample security for it. The Plaintiffs, however, cannot touch any portion of the security until they have paid the debt. If the company held security to the amount of a million, the Plaintiffs could not touch a farthing of it without satisfying the debt.

It seems to me, too, that the account prayed for, cannot be taken in the absence of the persons who are alleged to be necessary parties.—What is asked, is that, if it shall appear that the banking company have any lien or charge upon the shares of *Connell*, *Webster* and *Boyd*, prior to the Plaintiffs' charge thereon, then that an account may be taken of what is so due to them. I do

1851.

MACINTYRE

v.

CONNELL.

not know why the bill says : " if it shall appear ; " because it alleges that they have a charge on the shares. And then it asks that proper directions may be given for the satisfaction thereof out of the said shares, and out of or by means of the other securities held by them, or for enabling the Plaintiffs to pay, to the Company, the amount of such charge, and to have assigned to them, thereupon, the said several securities held, by the said banking company, for the same ; and that proper directions may be given for marshalling the said securities, so as to give the Plaintiffs the benefit of their charge upon the said shares. The bill, therefore, so far as it prays this relief, is a bill by a second incumbrancer to redeem the first (which he would have a right to do) and to have all the securities held by the first incumbrancer, assigned to him. But that cannot be done without having the persons who gave those securities, before the Court.

I shall now advert to Mr. *James's* answer to the objection, which was that, as *Connell* was one of the debtors, he was not at liberty to make the objection.—I think, however, that what Mr. *Stuart* said is quite correct ; namely, that *Connell* and every other person who is interested in the account, is at liberty to make the objection ; because he, as well as they, has a right to have the account taken so that it may bind all parties, and conclude, for ever, all matters arising out of it.

The only other point that remains to be considered, is Mr. *Bethell's* second answer to the objection ; which was that the bill contained a charge for the purpose of discovering who the persons alleged to be necessary parties, are.—I think that, if the bill had alleged that the Plaintiffs did not know who those persons were, the demurrer

would not have held ; but it makes no such suggestion : and, therefore, the discovery is sought not to enable the Plaintiffs to supply the defect of parties, but merely as ancillary to the relief : and the rule is that if a Plaintiff cannot have the relief, he cannot have the discovery.

1851.
MACINTYRE
v.
CONNELL.

It appears to me that none of the answers meet the objection, and, consequently, that, although the grounds of demurrer on the record are overruled, the ground alleged *ore tenus*, must be allowed.

After the judgment had been pronounced, some discussion took place with regard to costs. The question was whether no costs were to be given on either side, or whether the Plaintiffs were to be allowed the costs of the demurrer on the record.

Demurrer.
Costs.
Amendment.

Mr. *Bethell* referred to the *Attorney-General* v. *Brown* (a) and *Mortimer* v. *Fraser* (b), and asked for leave to amend the bill by either adding parties to it, or striking out of it the passages which made the adding of parties necessary.

The demurrer on the record having been allowed, and a Demurrer *ore tenus*, for want of parties, having been overruled, the Court ordered the Defendants to pay the costs of the former, but made no order as to the costs of the latter ; and gave the Plaintiff leave to amend either by adding parties, or striking out the passages which made the new parties necessary.

Mr. *Stuart* referred to *Newton* v. *Lord Egmont* (c).

The *Vice-Chancellor*.—I will consider this question, and give my opinion on it to-morrow morning.

- (a) 1 Swanst. 263, see 288. (b) 2 Myl. & Cr. 173.
(c) 4 Sim. 547.

1851.

MACINTYRE

v.

CONNELL.

5th March.

The VICE-CHANCELLOR :

My first impression was that, in a case like the present, where the causes of the demurrer stated on the record, are disallowed, but the cause alleged *ore tenus* is allowed, the practice was not to give costs to either party; and I still think that that is the more reasonable course of proceeding. But there is an order of Lord *Clarendon's*, made just after the Restoration, in the following words:—"If any case of demurrer shall arise and be insisted upon at the debate of the demurrer more than is particularly alleged, yet the Defendant shall pay the ordinary costs of overruling a demurrer, which is hereby ordered to be five marks, if those causes which are particularly alleged, be disallowed; though the bill, in respect of the particulars so newly alleged, shall be dismissed by the Court."* And it appears, from the *Attorney-General v. Brown* and *Mortimer v. Fraser*, that the practice has been according to that order; and, therefore, I shall order the Defendants to pay the costs of the demurrer on the record, as it is called; but make no order as to the costs of the demurrer *ore tenus*: and I shall give the Plaintiffs leave to amend their bill, not generally, but by either adding parties, or making such alterations in it as may cure the defect of parties.

* This Order is contained in Mr. Beames's Collection, page 174.

SMITH v. CORLES.*

THIS was a claim to foreclose a mortgage made by a Defendant who had absconded.

Mr. *Roberts*, for the Plaintiff, moved for an order against the Defendant, under the 31st General Order of May 1845 (a).

The *Vice-Chancellor* refused the motion, saying that the 13th General Order of April 1850, did not authorize the Court to make a decree against a Defendant *for whom* an appearance had been entered, and, therefore, an appearance entered for the Defendant under the 31st Order of May 1845, would be inoperative.

Claim.
New orders.
Practice.

Motion for an order under the 31st General Order of May 1845, against a Defendant to a claim who had absconded, refused.

* *Ex relatione Mr. Roberts.*

(a) See Beav. Ord. 295.

In Re Bagdo, Dec. 11th 1869.

Buna v Rhodes, 10 W.R. 456

1851 :
10th and 20th
January :
and
22nd February.

*Lands Clauses
Consolidation
Act.*

*Reinvestment
of compensation
money.
Conversion.*

IN THE MATTER OF CROSS'S ESTATE AND
OF THE LANDS CLAUSES CONSOLIDATION
ACT 1845, AND OF

THE EAST LINCOLNSHIRE RAILWAY ACT.

EX PARTE FLAMANK AND OTHERS.

Money paid into Court, by a railway company, for land taken, under the Lands Clauses Act, from a person who was in a state of mental imbecility, and who continued in that state until his death, but was not the subject of a commission of lunacy, ordered, after his death, not to be reinvested in or considered as land, but to be paid to his executors.

T. L. CROSS, late of *Louth* in the county of *Lincoln*, miller, by his will dated in 1839, devised his residuary real estate to trustees, in trust, in equal third parts, for his three nieces, the Petitioners, for their separate use for life, with remainder for their children in fee; and he bequeathed his residuary personal estate to the Petitioners share and share alike, and appointed them the executrixes of his will.

The *East Lincolnshire* Railway Act was passed in 1846, and the Companies Clauses, the Lands Clauses and the Railway Clauses Consolidation Acts, were incorporated with it. In November 1848, at which time *Cross* had become paralytic and wholly incapable of transacting or even attending to business, the Company took possession of part of his land comprised in the residuary devise in his will, for the purposes of their undertaking, and served him with notice, under the 18th section of the Lands Clauses Act, that they were willing to treat for the purchase thereof. No attention was paid to that notice: in consequence of which the Company procured a jury to be summoned to determine the amount of the purchase-money: but

neither *Cross* nor any person on his behalf, appeared on the inquiry before the jury: whereupon the amount of the purchase-money was determined, by a surveyor appointed by two justices of the peace to be 740*l.*: and, in April 1849, the Company paid that sum into Court, to the credit of *Ex parte the East Lincolnshire Railway Company*, the account of *T. L. Cross* of *Louth* in the county of *Lincoln*, miller.*

1851.
IN RE THE
EAST
LINCOLNSHIRE
RAILWAY
ACT.

Cross continued in a state of mental imbecility until his death. He died in January 1850, but without having been the subject of a commission of lunacy. The petition was presented in April 1850, at which time all the Petitioners were married, but only one of them had issue. It stated that the Petitioners or their husbands had not settled or agreed to settle their shares of the 740*l.*; and prayed that one-third part of that sum, might be paid to each of their husbands; or, if the Court should be of opinion that the 740*l.* was to be considered, in equity, as part of *Cross's residuary real estate*, then that it might be invested in Consols, in the name of the *Accountant-General*, to the credit of *Ex parte the East Lincolnshire Railway Company*, the account of the devisees of *T. L. Cross*, late of *Louth* in the county of *Lincoln*, miller; and that one-third of the dividends might be paid, to each of the Petitioners, on her separate receipt, till further order.†

Mr. *Bethell*, and Mr. *Shapter*, in support of the petition, referred to the 7th, 76th, 77th and 78th sections of the *Lands Clauses Act*, and said that, if the owner

* See *Lands Clauses Act*, sects. 47, 58, and 76.

† See sects. 69 and 70.

1851.
 IN RE THE
 EAST
 LINCOLNSHIRE
 RAILWAY
 ACT.

of land taken by a company for the purposes of their undertaking, failed to appear on the inquiry before a jury, the purchase-money, whatever might be the cause of the owner's default, was to be paid into Court under the 76th section; and that the 78th section directed the Court to distribute it, *as personalty*, amongst the parties entitled to it.

Mr. *Lloyd* for the trustees of *Cross's* will and the infant children of one of the petitioners, said that *Cross* was in a state of mental incapacity at the time when the Company took his land, and continued in that state until his death; and that, though no committee of his estate was ever appointed, yet the enactments of the Lands Clauses Act with regard to persons in his unfortunate condition, applied; and, therefore, the 740*l.* ought to be reinvested in land under the 69th section, and the land be conveyed to the trustees upon the trusts of his will. Mr. *Lloyd* cited *The Midland Counties Railway Company v. Oswin* (a); and said that the 44th and 47th sections*

(a) 1 Coll. 74, see 80.

* The 44th sect. is stated, shortly, in Mr. *Collyer's* Report of the case cited, and, fully, in the judgment in this case. The 47th section is as follows:—And be it further enacted that, in case any party to whom any money shall be agreed or awarded to be paid for the purchase of any lands to be taken or used under or by virtue of the powers of this Act, or for any interest or for compensation as aforesaid, shall refuse or neglect to accept the same, or cannot be conveniently found, or shall be absent from the United Kingdom of *Great Britain* and *Ireland*, or shall refuse, neglect, or be unable to make a title to such lands, or to such interest in the premises, to the satisfaction of the said company, for the purposes of this Act, or if the party entitled unto, or required, by the said company, to convey or join in conveying such lands, or such interest

of the Act on which the question in that case arose, were substantially the same as the 76th and 78th sections of the Lands Clauses Act.

1851.
 IN RE THE
 EAST
 LINCOLNSHIRE
 RAILWAY
 ACT.

Mr. *Bethell*, in reply, said that the Lands Clauses Act contained no direction that the purchase-money for land taken from a person in a state of mental incapacity, should be dealt with otherwise than under the 78th section, unless he had been found to be either a lunatic or an idiot, and the land had been sold by the committee of his estate; in which case the money was to be re-

therein, shall not be known, or be not shown, to the satisfaction of the said company, to be such party, or shall refuse to convey or to join in conveying the same, then and in every such case, where not otherwise provided by this Act, it shall be lawful for the said company to order the money so agreed, offered, intended to be offered, or awarded as aforesaid, to be paid into the Bank of *England* in the name and with the privity of the *Accountant-General* of the Court of Exchequer, to be placed to his account to the credit of the parties interested in the said lands (describing them, so far as the said company can so do), subject to the control and disposition of the said Court; which said Court, on the application of any party making claim to such money or to any part thereof, by petition, is hereby empowered, in a summary way of proceeding or otherwise, to order the same to be laid out and invested in the public funds, and to order distribution thereof, or payment of the dividends thereof, according to the estate, title, or interest of the party making claim thereunto, and to make such other order in the premises as to the said Court shall seem proper; and the cashier of the Bank of *England* who shall receive such money, is hereby required to give, to the said Company, or to any party paying any money into the Bank of *England* under or pursuant to this Act, a receipt for such money, mentioning and specifying therein for what and for whose use (described as aforesaid) the same is received.

1851.
 IN RE THE
 EAST
 LINCOLNSHIRE
 RAILWAY
 ACT.

invested in land: that, by the Midland Counties Railway Act, failure to appear on an inquiry before a jury and mental incapacity, were put on the same footing; but that was not the case in the Lands Clauses Act: and he cited *Ex parte Hawkins* (b), and also *Oxenden v. Lord Compton* (c), and *Ex parte Clayton* (d), in order to show that there was no equity between real and personal representatives.

22nd February.

The VICE-CHANCELLOR:

The petition in this case was presented by the executrixes of a deceased gentleman of the name of *Cross*, praying that the sum of 740*l.*, which had been paid, into Court, by the *East Lincolnshire* Railway Company, for lands of which the deceased had been seised in fee and which the Company had taken for the purposes of their undertaking, might be paid out, to the Petitioners, in certain shares. I should have ordered the money to be paid to them, as a matter of course, if an affidavit had not been filed stating that *Cross*, at the time when the Company gave him notice of their intention to take his land and until his death, was in a state of mental imbecility: and I shall decide who are the parties entitled to the fund in Court, on the assumption that that was the case.

The question depends upon the construction of the Lands Clauses Consolidation Act, 7 & 8 Vict. c. 18. The 7th section of that Act says that it shall be lawful *for all parties* being seised of any lands which the promoters of the undertaking may require for the purposes of their undertaking, to sell and convey the same to the

(b) 13 Sim. 569.

(c) 2 Ves. Jun. 69.

(d) 1 Russ. & Myl. 369.

promoters, and to enter into all necessary agreements for that purpose, and, particularly, that it shall be lawful for corporations, tenants for life, &c., so to do. So that all persons are enabled to sell and convey: and it was contended that, as *Cross* was seised in fee, he would not have wanted any authority to sell and convey, unless he had been in a state of mental imbecility; and that the words, "it shall be lawful for all persons," &c., gave him that authority. But I do not think it will be necessary to decide whether authority was given to him, by those words, or not. For it is certain that the Company did not, in this case, get the lands by agreement. What then is the way of getting possession of lands otherwise than by agreement? Sect. 18 says that, when the promoters of the undertaking shall require to purchase or take any of the lands which they are authorized to purchase or take, they shall give notice thereof to the parties interested in such lands, or to the parties enabled, by the Act, to sell and convey the same, and, by such notice, shall demand, from such parties, the particulars of their estate and interest in such lands and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof. Now that notice was given to *Cross*. Then section 21 enacts that if the party to whom such notice has been given, shall fail, for twenty-one days after the service of it, to state the particulars of his claim in respect of such land, or to treat *or agree*, with the promoters, in respect thereof, the amount of the compensation to be paid to him, shall be settled in the manner thereafter provided for settling cases of disputed compensation. Then the Act provides two modes of settling disputed claims to com-

1851.
IN RE THE
EAST
LINCOLNSHIRE
RAILWAY
ACT.

1851.

IN RE THE
EAST
LINCOLNSHIRE
RAILWAY
ACT.

pensation: one is by arbitration; which is out of the question here: the other is by a jury; and, with respect to that, sect. 38 provides that, before the promoters shall issue their warrant for summoning a jury for settling any case of disputed compensation, they shall give not less than ten days' notice, to the other party, of their intention to cause such jury to be summoned, and, in such notice, the promoters shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party. That also was done. Then sect. 39 enacts that in every case in which any such question of disputed compensation, shall be required to be determined by the verdict of a jury, the promoters of the undertaking, shall issue their warrant to the sheriff, requiring him to summon a jury for that purpose. That too was done; and the jury met; but *Cross* did not attend, and, in such a case, the 47th section says that the inquiry shall not be further proceeded in, but the compensation shall be ascertained by a surveyor appointed by two justices of the peace. Accordingly a surveyor was appointed pursuant to the 58th section; and he ascertained the compensation to which *Cross* was entitled in respect of his land, to be 740*l.*; and that sum was paid into the Bank under the 76th sect. which directs that the purchase-money shall be paid into the Bank, in the name of the *Accountant-General*, to the credit of the parties interested (that is, in this case, to the credit of *Cross*) if the owner of the land fails, as was the case here, to appear on the inquiry before the jury. Then sect. 78 directs what is to be done with the money when it is in the Bank. It says that, upon the application, by petition, of any party making claim to the money or any part thereof, or to the lands in respect whereof the same shall have been

deposited, or any part of such lands, or any interest in the same, the Court of Chancery may, in a summary way, as to such Court shall seem fit, order such money to be laid out or invested in the public funds, or may order distribution thereof, or payment of the dividends thereof, according to the respective estates, titles, or interests of the parties making claim to such money or lands, or any part thereof, and may make such other order in the premises as to such Court shall seem fit. Under that section the executrixes of *Cross* claim the 740*l.*, as being the purchase-money to which *Cross* was entitled for the land taken by the Company.

1851.
 IN RE THE
 EAST
 LINCOLNSHIRE
 RAILWAY
 ACT.

Now did sect. 7 authorize *Cross* to sell, or did it not? If it did, the effect, in my opinion, was to make his contract as good as if he had been *compos mentis*; and his executrixes would clearly be entitled to the 740*l.* He was compelled to sell; but, when he had sold, he stood in the same situation as he would have been in, if he had been *compos mentis* and had sold voluntarily.

If he was not authorized to sell, and, therefore, the Company were not justified in taking his land under the compulsory powers of the Lands Clauses Consolidation Act, still the devisees under his will cannot be entitled to the money. Their claim would be to the land, and not to the money. And it does not lie in the mouth of the company to make the objection; for they have taken the land; and, therefore, they cannot say that there was no authority to take it. Therefore I can deal with the money in no other way than as if it had been paid for the purchase of land sold by a person seised in fee, and who was competent to sell it.

It was observed, in the course of the argument, that

1851.
IN RE THE
EAST
LINCOLNSHIRE
RAILWAY
ACT.

the 78th sect. of the Act empowers the Court to order the money in Court to be invested in the funds, or to order distribution thereof or payment of the dividends thereof, according to the respective estates, titles or interests of the parties making claim to such money or lands. But that gives no claim to the parties who are entitled in remainder, under *Cross's* will. Those words were necessary because the persons seised of the lands in respect of which the money had been paid into Court, might be seised as joint-tenants, or tenants in common, or as tenant for life and remainderman.

I hesitated to give judgment in this case, because I was informed that *Vice-Chancellor Knight Bruce* had decided that money paid for land taken by a railway company from a person in a state of mental imbecility, was to be considered as land. But, on looking at the Act on which the case before him arose, I found that it contained a provision differing very materially from the provisions of the Act on which I am now adjudicating. It was a local Act passed in the 6 Will. IV., and, therefore, long before that Act. It contained a sect. corresponding, very nearly, with the 7th sect. of the Lands Clauses Act. The 14th sect. empowered all corporations, tenants in tail or for life, trustees, &c., and all other persons whomsoever to contract for the sale of the lands of which they were seised, and to convey the same to the company. That section seems to me to be very much in conformity to the 7th sect. of the Lands Clauses Act. Then observe what follows in sect. 31 of the local Act. It says that if any persons thereby capacitated to sell, should neglect or refuse to treat, or should not agree, with the company, for the sale of their estates or interests; or should, by reason of absence, be prevented from treating, or should, by reason of

any impediment or disability, whether provided for by the Act or not, be incapable of making such agreement conveyance or release as should be necessary or expedient for the purpose of enabling the company to take such lands or to proceed in making the railway, or, in any other case where an agreement for the purchase of lands could not be made, then and in every such case, the company should and were thereby required to issue a warrant to the sheriff commanding him to summon a jury to inquire as to the sum of money to be paid for the purchase-money of the land to be taken.

1851.
IN RE THE
EAST
LINCOLNSHIRE
RAILWAY
ACT.

It is quite clear, therefore, that, when the Company wanted the lands of any person who was incapable of agreeing for the sale of them, it was their duty to have the sum to be paid for them ascertained by a jury. Then sect. 44 enacts: "That if any money shall be agreed or awarded to be paid for the purchase of any lands to be taken or used by virtue of the powers of this Act, or of any interest therein, or for any compensation or satisfaction under this Act, which any corporation, trustee, or feoffee in trust, or any person whomsoever having no power to convey the premises in respect of which the same may be payable, otherwise than by virtue of this Act, shall be entitled unto or interested in, such money shall, in case the same shall amount to or exceed the sum of 200*l.*, with all convenient speed, be paid into the Bank of *England*, in the name and with the privity of the *Accountant-General* of the Court of Exchequer, to be placed to his account there, *Ex parte* "The Midland Counties Railway Company;" and shall, when so paid in, there remain until the same shall, by order of the said Court made in a summary way upon petition to be presented to the said Court by the party who would

1851.
IN RE THE
EAST
LINCOLNSHIRE
RAILWAY
ACT.

have been entitled to the rents and profits of the said lands, be applied either in the purchase or redemption of the land tax, or in or towards the discharge of any debt or other incumbrance affecting the said lands, or affecting other lands standing settled therewith to the same or the like uses, trusts, intents, or purposes, as the said Court of Exchequer shall authorize to be purchased or paid, or such part thereof as shall be necessary; or until the same shall, upon the like application, be laid out, by order of the said Court made in a summary way as aforesaid, in the purchase of other lands, which shall be conveyed, limited, and settled to, for, and upon such and the like uses, trusts, intents, and purposes, and in the same manner as the lands which shall be so purchased, taken, or used as aforesaid, or in respect of which such compensation or satisfaction shall be paid, stood settled or limited, or such of them as, at the time of making such conveyance and settlement, shall be existing, undetermined or capable of taking effect; and, in the mean time and until such purchase can be made, the said money may, by order of the said Court upon application thereto, be invested, by the said *Accountant-General*, in his name in the purchase of £3 per Cent. Consolidated or £3 per Cent. Reduced Bank Annuities, or in Government or real securities; and, in the mean time and until such annuities or securities shall be ordered, by the said Court, to be sold for the purposes aforesaid, or shall be called in or cancelled, the dividends or interest and annual produce thereof shall, from time to time, by order of the said Court, be paid to the party who would for the time being have been entitled to the rents and profits of such lands so to be purchased and settled." That is an express provision that, when any person has his lands taken under the

powers of the Act, the money paid for them shall be reinvested in the purchase of land. Therefore the decision to which *Vice-Chancellor Knight Bruce* came in that case, was right under the express terms of the local Act. But the language of the general Act is, as I have pointed out, very different; and so I do not feel myself pressed by that decision. I must treat the money as being paid in by a party seised in fee and competent to sell: and, therefore, I shall order it to be paid out to the executrixes of *Cross*.

1851.
IN RE THE
EAST
LINCOLNSHIRE
RAILWAY
ACT.

The costs which the Company are liable to, must be paid by them, and the extra costs must come out of the fund.

1851 :
21st and 25th
January

*Injunction.
Railway
Company.*

After a Railway Company had purchased a piece of land from *A.*, who was mentioned in the book of reference to be the owner of it, *B.*, a neighbouring land-owner, part of whose land the Company had also taken, claimed to be owner of the piece of land, and filed a bill for an injunction to restrain the Company from continuing in possession of it, and from committing waste on it. But the Court refused the injunction.

SIR GODFREY WEBSTER v. THE SOUTH-EASTERN RAILWAY COMPANY.

THE bill, which was filed on the 20th December 1850, and the affidavit in support of it, stated that, in July 1836, the Plaintiff became seised, for his life, amongst other hereditaments in the parish of *Battel* in *Sussex*, of a piece of land containing about a quarter of an acre, bounded as therein mentioned, and that he had ever since continued and still was seised thereof or otherwise entitled thereto: that, on the 18th of July 1846, the Defendants obtained an Act of Parliament for making a railway from *Tonbridge Wells*, to join the *Rye* and *Ashford* extension of the *Brighton, Lewes and Hastings* Railway, near *Hastings*, with which Act the Lands Clauses Consolidation Act 1845, was incorporated: that, in May and June 1849, during the Plaintiff's absence abroad in her Majesty's service, the Defendants left notices, at *Battel Abbey*, of their intention to take certain pieces of land, part of the Plaintiff's *Battel Abbey* estate, for the purposes of the said railway; and, in June, they appointed a valuer thereof, and he valued them at 6987*l.*, and, on the 2nd of November 1850, the Defendants paid that sum into Court: that the Plaintiff, being dissatisfied with the valuation, served the Defendants, on the 30th of December 1850, with a notice, pursuant to the 64th sect. of the Lands Clauses Act, stating that he had appointed a person therein named, to arbitrate, on his behalf, as to the sufficiency of the valuation, and requesting the Defendants to name an arbitrator on their behalf: that the first-mentioned

piece of land was not comprised either in the notices left at *Battel Abbey*, or in the valuation: that, on the 13th of December 1850, the Defendants wrongfully took possession of that piece of land for the purpose of the said railway and had felled trees thereon, but had not offered to make the Plaintiff any compensation for it: that the Plaintiff was absent from *Battel Abbey* on the 13th of December 1850, and was not informed that the Defendants had taken possession of the piece of land, until three or four days afterwards: that the Defendants had not served, on him, or on any person on his behalf, any notice of their intention to take the piece of land; and that their compulsory powers for taking land, expired on the 18th of June 1849. The bill prayed for an injunction to restrain the Defendants from keeping possession of the piece of land, and from digging, using, interfering, or, in any manner meddling with the same, and from committing any waste or spoil thereon.

The Defendants having been served with notice of a motion for the injunction, affidavits were made on their behalf, stating that the piece of land in question, was an integral part of a field belonging to the deanery of *Battel*: that the Defendants had purchased the whole of the field, from the dean: and that, if the piece of land did, in fact, belong to the Plaintiff, it was not necessary or material for the enjoyment of any of his other lands, nor would they be damaged by the execution of the Defendants' works on the piece of land. Affidavits in reply, were made by the Plaintiff and two gentlemen named *Ticehurst* and *Soan*, in support of the Plaintiff's title to the piece of land.

Mr. *Malins* and Mr. *Schomberg*, in support of the

1851.

WEBSTER
v.
THE SOUTH-
EASTERN
RAILWAY
COMPANY.

1851.

WEBSTER

v.

THE SOUTH-
EASTERN
RAILWAY
COMPANY.

motion, cited *Brocklebank v. The Whitehaven Junction Railway Company* (a) and three unreported cases: *Kinnersley v. The North Staffordshire Railway Company*, *Baker v. The same*, and *Shaw v. The London and North-Western Railway Company*.

Mr. Bethell, Mr. Roundell Palmer, and Mr. Baily *contra*, cited *Davenport v. Davenport* (b), and *The London and North-Western Railway Company v. Smith* (c).

Mr. Malins replied.

At the conclusion of the argument,

The *Vice-Chancellor* made the following observations: I cannot decide this case without looking at the affidavits and at the cases that have been cited. The authorities go to this extent, and to this extent only: that, as the Court will prevent individuals from cutting down timber or committing any other kind of waste on an estate which they have contracted to purchase, until the contract is completed; so it will restrain companies from doing anything to the detriment of parties, by virtue of the statutory powers given to them, until those powers have been duly complied with. But this is a case of a very different nature. The company, either rightly or wrongly, supposed that they were dealing with the rightful owner of the piece of land in question, when they were dealing with the Dean of *Battel*; and, in that belief, they paid the purchase-money either to him, or into Court to his credit: and what they contend against the Plaintiff, is that they have rightful possession of the piece of land

(a) 15 Sim. 632.

(b) 7 Hare, 217.

(c) 1 Hall & Twells, 364, and 1 Macn. & Gord. 216.

under their contract with the Dean. The Plaintiff meets that by showing, or attempting to show that he is, in truth, the owner of the piece of land. It seems to me to be very doubtful whether that is a matter which this Court can enter into: and, if I wanted to have my doubts excited about it, they would be raised by the very vague and loose evidence given by Mr. *Ticehurst* and Mr. *Soan*. These gentlemen state matters that, when coupled with other facts, might induce a jury, in an action of ejectment, to come to the conclusion that the Plaintiff was the owner or had been in possession of the piece of land. But, supposing that to be so, how do I know that, if the company were to agree, with the Plaintiff, for the purchase of the piece of land, some one else may not start up and say that he is the owner. I can understand the principle upon which the Court prevents companies, powerful bodies as they are, from acting by virtue of the powers given to them by Parliament, until they have done what their Act of Parliament requires. But, in this case, the company is not availing itself of its parliamentary powers. It has got the land, not from the Plaintiff, but from the Dean of *Battel*, and is in possession of it: and, in such a case, it does not appear to me that there is any principle upon which the Court can interfere more against a company, than it would against an individual. This is a case of a company claiming by an adverse title, not under the Act of Parliament, and saying that there is no privity, between it and the Plaintiff, in respect of this piece of land. I will not, however, dispose of the case until I have read the affidavits and looked at the authorities.

1851.
 WEBSTER
 v.
 THE SOUTH-
 EASTERN
 RAILWAY
 COMPANY.

The VICE-CHANCELLOR :

25th January.

This was a motion to restrain the Defendants, the South-Eastern Railway Company, from keeping posses-

1851.

WEBSTER

v.

THE SOUTH-
EASTERN
RAILWAY
COMPANY.

sion of, or entering, or continuing in or upon the piece or parcel of land in the pleadings particularly described, and also from digging, using, interfering or in any manner meddling with the same, and from committing any waste or spoil thereon or on any part thereof. The bill, which was filed by Sir *Godfrey Webster*, was verified by his affidavit; and the affidavit states, &c. &c.

The bill asks no relief except the injunction; and I am of opinion that it makes no case whatever for the relief that it does ask, and for this reason. The Company here claim nothing whatever, from the Plaintiff, under the powers of the Act of Parliament, so far as this piece of land is concerned. They claim adversely by title. In the map or plan and book of reference deposited with the clerk of the peace for the county of *Sussex*, the piece of land in question was described as being church property; that is, part of the glebe belonging to the Deanery of *Battel*. And the Company, by their affidavits in answer, set up this case: that they, believing this piece of land to be, as they still believe it to be, the land of the Dean, served him with notice to treat for the purchase of it, and that they have paid the purchase-money into Court: and they claim it, not from the Plaintiff under any of the powers of the Act, but against him, saying that they have derived title to it, not from him, but from a third person.—I have looked through the cases as far as I have been able, and I find no authority for saying that, in such a case, this Court will interfere against a railway company more than it will against an individual. The cases in which the Court interferes, are those in which the person seeking relief, is a person whom the Company is seeking to dispossess under the powers of their Act; and in which the Court has said that it will hold the Company strictly to showing that

they are duly complying with the powers given them by their Act. That was the case of *Brocklebank v. The Whitehaven Junction Railway Company*.^{*} There the powers of the Act terminated on a certain day. Just previously to that day, a jury was assembled to assess the value of a yard belonging to the Plaintiff, which the Company were authorized to take under the powers of their Act: but the verdict was not returned till afterwards. If the late *Vice-Chancellor of England* was right in thinking that the verdict was a nullity because it was not returned until after the powers of the Act had terminated, then his conclusion was quite right that the Company ought not to be allowed to proceed to obtain possession of the yard under a pretended authority from an Act of Parliament which they did not possess. Lord *Cottenham*, on appeal, doubted whether the conclusion which the *Vice-Chancellor* had come to upon the provisions of the Act, was correct; and he directed a case to be sent for the opinion of a Court of law. But if his Lordship had not entertained that doubt, he would have adopted the same course as the *Vice-Chancellor* had done. The case of *Barker v. The North Staffordshire Railway Company* is resolvable into the same principle. There the Company had given notice of their intention to take ten pieces of land, but, in the progress of their works they found, or they thought they should find that they required only eight; and they proceeded to pay the money for and to take possession of the eight. But *Vice-Chancellor Knight Bruce* held that they could not take the land piecemeal; but must take the ten acres and pay for them; and, in that respect, Lord *Cottenham* was exactly of the same opinion as *Vice-Chancellor Knight Bruce*. The principle on which the Court interfered, was that the Company was bound to adhere strictly to the terms of the contract which it had forced upon the

1851.

WEBSTER

v.

THE SOUTH-
EASTERN
RAILWAY
COMPANY.

* 15 Sim 632

see contra, Reg v. Burin & Co. R. 1

15 Q.B. 647

contra *Kilmer v. North. Ry*

16 C.B. 539.

Spencer v. Exford R. Co

6 Hare 126

1851.
WEBSTER
v.
THE SOUTH-
EASTERN
RAILWAY
COMPANY.

Plaintiffs under its parliamentary powers. But how does that apply to a case like the present, where the Railway Company claim nothing whatever from Sir *Godfrey Webster*, but claim adversely to him? The Company, it is true, claim other land from him; and, with regard to that, there is a dispute pending between them. But it is part of Sir *Godfrey Webster's* case to say that the piece of land in question forms no part of that which is the subject of the dispute. I cannot therefore but feel not only that this case does not come within the principle of the cases to which I have adverted; but that, in granting an injunction in such a case as this, I might, instead of preventing irreparable mischief, be doing, perhaps, irreparable mischief. For if, after the Railway Company have given notice to a person whom they have considered to be the owner of the piece of land, and have treated with him, and purchased the land from him, the Court were to interfere, and stop the railway, *brevi manu*, at the instance of a third person, who applies to it at the last moment, and says, vaguely, that he was, at a former time, seised of or otherwise entitled to it, the Court would, very likely, be instrumental in doing injury, by putting an improper pressure on the Railway Company for the advantage of that third person, and compelling the Company to come to terms with him, however unreasonable those terms might be.

This bill, I must observe, contains a vast deal of matter, the greater part of which might be struck out as having not the smallest reference to the matter in question. The bill begins with stating the title of the Plaintiff; and if everything else were left out of it until you come nearly to the end of it, you would have everything on which the equity, if it may be so called, is founded; namely, that though the Plaintiff was seised of

or entitled to the piece of land, the Railway Company had entered upon it and begun to use it for the purpose of their railway, without getting a title from him. There is no allegation that an ejectment or an action of trespass, will not give the Plaintiff all the relief that he is entitled to. He merely says that the Railway Company are proceeding to assert their title to the land which he thinks he is entitled to.

1851.
WEBSTER
v.
THE SOUTH-
EASTERN
RAILWAY
COMPANY.

My view of the case renders it unnecessary for me to discuss the question, on which side the balance of testimony inclines as to who is the owner of the land. The Plaintiff has stated some facts which, if he were trying an ejectment for this piece of land, might, either alone or with some other evidence, warrant the jury in saying that he is the owner of it. On the other hand he is met by evidence on the part of the Company, which, upon such a trial, might lead to the conclusion that he was not the owner. The case is one of very minute circumstances, leaving it exceedingly doubtful with whom the real truth and justice of the case, as to the title, rests. On the part of the Company it is to be observed that this small piece of land forms, to the eye, part of a large close of thirteen acres called, *The Pound Close*, which, certainly, belongs not to the Plaintiff, but to the Dean of *Battel*. However that is not conclusive. It may be that though the close is all, to the eye, one close, yet a corner—a quarter of an acre of it, may not belong to the owner of the rest of the field. Nevertheless everybody must feel that, on the trial of an ejectment, it would be a strong circumstance in favour of the Company that the close is, unsevered by metes or bounds, and that about fifty-one fifty-second parts of it do not belong to the Plaintiff.

His Lordship then commented upon the affidavits made

1851.

WEBSTER

v.

THE SOUTH-
EASTERN
RAILWAY
COMPANY.

by *Ticehurst* and *Soan*, which, he said were very loosely and vaguely worded, and then proceeded as follows :

If the Plaintiff had been able to show that he had ever received rent for this piece of land, no doubt he would have done so : but he is quite silent upon that important point. I view the evidence on the one side and on the other, as equipollent. But I do not rely on that. In my opinion, where there is a mere, dry question of adverse title, a bill filed on that ground, without more, entitles the Plaintiff to no relief whatever. If I were to come to a contrary conclusion, and were to hold that the Plaintiff is entitled to the relief which he asks, and the Railway Company were to compromise with him, as it is likely they would do, what is there to prevent some other person from filing another bill, showing plausible grounds of title, and stating that he is entitled to this land ? The consequence of which would be that the Company would be stopped again.

This is a mere case of adverse title, claimed, by the Plaintiff, upon very slight evidence indeed, and without alleging that an action of ejectment or an action of trespass will not give him all the remedy he can possibly be entitled to or wish for. And my opinion is that I should be extending the jurisdiction further than any case warrants or any regard to convenience requires, if I were to grant this motion : and, therefore, I shall refuse it with costs.

IN THE WINDING-UP OF THE DIRECT
SHREWSBURY AND LEICESTER RAIL-
WAY COMPANY.

EX PARTE BRITTAİN.

THIS was a motion by way of appeal from the decision of the *Master*, who had struck *Brittain's* name off the list of contributories to the above-mentioned provisionally registered Company. The circumstances of the case were as follows :—

On the 18th of October, 1845, the solicitor to the Company wrote a letter to *Brittain*, inclosing a prospectus of the Company, and requesting him to allow his name to be placed on the list of the provisional committee. On the 20th, *Brittain* replied that he should be glad to be placed upon the committee as an ornamental member, and was willing to take such number of shares as might be allotted to him, in the usual manner; but that the great number of railways he was then connected with, put it out of his power to act upon the executive. On the 20th of November, 1845, the secretary to the Company wrote to inform *Brittain* that the committee of management had allotted him twenty-five shares in the undertaking; that an instalment of 2*s.* per share on the deposit of 2*l.* 2*s.* 6*d.* per share, must be paid, on or before the 4th of December then next, to one of the

1851 :
25th February.
*Joint-stock
Companies
Winding-up
Acts.
Contributory.*

A. consented to his name being placed on the list of the provisional committee of a Company, as an ornamental member, and to take such number of shares in the Company as might be allotted to him. Afterwards the managing committee allotted him twenty-five shares. The letter of allotment stated that, on payment of the deposits, the receipts must be exchanged for a certificate of scrip, which would be granted on the due execution of the

subscribers' agreement and parliamentary contract, *without which no person would be recognised as a subscriber, or be entitled to any interest in the undertaking.* Those instruments were never engrossed; and, consequently, *A.* never executed them. He, however, paid the deposits on the twenty-five shares, but not until after the undertaking had been abandoned.

The *Master* struck *A.'s* name off the list of contributories; but the Court ordered it to be restored.

1851.
 BRITTAIN'S
 CASE.

Company's bankers, either of whom would give a receipt for the same on account of the Company, and that, on payment thereof and of the residue of the deposit, the accompanying receipts must be exchanged for a scrip certificate, which would be granted on the due execution of the subscribers' agreement and parliamentary contract, *without which no person would be recognised as a subscriber*, or be entitled to any interest in the undertaking; and that those instruments would lie for signature at certain places, of which the subscribers would be duly informed. *Brittain*, knowing, as he stated in his evidence before the *Master*, that he should be in *Manchester* in January, 1846, where he went on his own business twice a year, did not pay any part of the deposits on his shares until the 16th of that month, but, being at *Manchester* on that day, *he paid the full amount of the deposits* into the *Manchester* and *Liverpool* District Bank, which was one of the banks mentioned in the secretary's letter. Before that time, however, the undertaking was abandoned. The subscribers' agreement and the parliamentary contract were prepared, but were never engrossed; and, consequently, *Brittain* never executed either of them.

Mr. *Malins* and Mr. *Glasse*, for the official manager, supported the motion. They said that *Brittain* was a provisional committeeman, and had accepted shares in the Company; and, therefore, his name ought not to have been struck off the list: *Upfill's case* (a).

Mr. *Manisty* (with whom was Mr. *Bethell*) for *Brittain*, said that the deposits were not paid until after the abandonment of the undertaking; and that, as *Brittain*

(a) 2 House of Lords Cases, 674.

never executed the subscribers' agreement or the parliamentary contract, he never became interested in the undertaking, and, consequently, his name had been properly struck off the list: *Barber's case* (b).

1851.
BRITTAIN'S
CASE.

The VICE-CHANCELLOR having said, in the course of the argument, that he subscribed to every word of the judgment in *Barber's case*, but that it did not apply to the present, delivered the following judgment :

I have expressed, more than once, my regret that *Upfill's case* was decided as it was. I confess that I do not understand the principle on which it was decided ; and, when a case is cited to guide a judge, the principle of which he does not understand, it is very difficult for him to say whether the case before him does or does not come within the principle. It seems to me, however, that this case and *Upfill's* are completely parallel to each other. It is not disputed that Mr. *Brittain* was a member of the provisional committee ; it is true that he consented to be nothing more than an ornamental member ; but I must interpret that expression as meaning that he did not mean to take an active part in the affairs of the Company. *Upfill*, as Mr. *Malins* observed, was not an active member of the committee. Then Mr. *Brittain* said that he was willing to take such number of shares as might be allotted to him. This was a prospective acceptance of shares. But if, on receiving the letter of allotment, he had paused, and not proceeded further, because, though he had agreed to accept shares, he did not mean to accept them on the terms mentioned in that letter, he might, perhaps, have been at liberty to do so, and then this case would have been within the principle of *Barber's case*. But he did not pause. He did not, it is true,

(b) 15 Jur. 51.

1851.
 BRITTAİN'S
 CASE.

say that he accepted the allotment, but he did what was a great deal stronger, he paid the full amount of the deposits which he was bound to pay on the shares allotted to him. Therefore, I cannot distinguish this case from *Upfill's case*: and the consequence is that Mr. *Brittain's* name must be replaced on the list. The official manager must have his costs out of the estate.

VAUGHAN v. BUCK.

1851:
 21st February,
 and
 15th April.
Feme Covertē.

The dividends of stock standing in the *Accountant-General's* name, to which a woman was entitled for life at the time of her marriage, were ordered to be paid to her husband during her life or until further order. Some time afterwards, the husband deserted his wife, and became bankrupt, having previously possessed himself of 2000*l.*, to which she was absolutely entitled.

The Court ordered two thirds of the dividends to be paid to the wife, and the other third to the husband's assignees.

THIS was a suit for the administration of the estate of a testator, who died in 1838, leaving a widow, to whom he had bequeathed his residuary estate for her life, and who, in 1839, married *James Wm. Buck*. By an order, made on the 22nd of April 1843, on the hearing of the Cause for further directions and of two petitions, one presented by Mr. *Buck* and the other by his wife, the dividends of certain sums of stock which constituted the testator's residuary estate and were then standing in the name of the *Accountant-General* in trust in the Cause, were ordered to be paid to Mr. *Buck*, for the life of his wife or until further order (a). In June 1850, Mr.

(a) See *Vaughan v. Buck*, 13 Sim. 404.

Buck became bankrupt. In July following, Mrs. *Buck* presented a petition stating that fact, and that, for some time past, *her husband had ceased to live with her, and had not contributed anything towards her maintenance or support*; that she was in very distressed circumstances, and wholly dependent on the voluntary contributions of her relations and friends for her daily maintenance and support: and that the dividends of the sums of stock standing in the name of the *Accountant-General* in trust in the Cause, amounted to 270*l. per annum*. The petition prayed that the *Accountant-General* might be directed to pay the dividends to the Petitioner, for her separate use, during her life or until further order. The affidavit in support of the petition stated, amongst other things, that Mr. *Buck* had possessed himself of 2000*l.* stock to which the Petitioner was absolutely entitled; and that he had never made any settlement on her. Mr. *Buck's* assignees presented a cross-petition, praying that the dividends of the stock standing in the *Accountant-General's* name, might be paid to them during the joint lives of Mr. and Mrs. *Buck* or until further order.

The petitions now came on to be heard.

Mr. *Stuart* and Mr. *Steere*, for Mrs. *Buck*, said that, when the order of the 22nd of April 1843, was made, Mr. *Buck* was living with his wife and maintaining her; but he had since deserted her, and become bankrupt; and she was now dependent, for her maintenance and support, on the bounty of her friends and relations; and, therefore, the circumstances under which the order of April 1843 was made, were materially altered; and the Court ought now to direct the whole income of the stock in Court to be paid to her. They cited *Wilkinson v.*

1851.

VAUGHAN

v.

BUCK.

1851.

VAUGHAN

v.

BUCK.

Charlesworth (b), *Gardner v. Marshall (c)*, *Green v. Otte (d)*, *Gilchrist v. Cator (e)*, *Williams v. Callow (f)*, *Oxenden v. Oxenden (g)*, *Elliott v. Cordell (h)*, and *Sturgis v. Champneys (i)*.

Mr. *Bethell* and Mr. *Cole*, for the assignees of Mr *Buck's* estate, said that the Court directed a settlement to be made of property which accrued to a woman during her coverture, and which her husband, or his assignees, could not get possession of without the assistance of the Court; but it never directed a settlement to be made of property to which the wife was entitled at the time of her marriage; that the right to the property in question had been actually adjudicated upon in April 1843, when the Court ordered the dividends of the stock to be paid to Mr. *Buck* during his wife's life, and dismissed the petition presented by her; and that the question in this case was concluded by that order. They cited *Beresford v. Hobson (k)*; and referred also to *Ball v. Montgomery (l)*, *Oswell v. Probert (m)*, *Elliott v. Cordell* and *Green v. Otte*.

Mr. *Rogers* appeared for Mr. *Buck*.

Mr. *Stuart* replied.

The VICE-CHANCELLOR said that he could not accede to the proposition contended for by Mr. *Bethell* and Mr.

(b) 10 Beav. 324.

(c) 14 Sim. 575.

(d) 1 Sim. & Stu. 250.

(e) 1 De Gex & Smale, 188.

(f) 2 Vern. 752.

(g) *Ibid.* 493.

(h) 5 Madd. 149.

(i) 5 My. & Cr. 97.

(k) 1 Madd. 362.

(l) 2 Ves., jun., 191.

(m) *Ibid.* 680.

Cole, that the Court never directed a provision to be made for a married woman, except out of property which accrued to her during the coverture, though he admitted that the Court would not direct a provision to be made for her out of property which had got into the sole control of the husband : that the main question in this case was, what was the true effect of the order of April 1843 ? That, if it had directed the dividends of the stock to be paid to Mr. *Buck*, absolutely, during the life of his wife ; the circumstance that his assignees could not obtain payment of the dividends without applying to the Court, would not give any right to his wife ; but the order did not direct the dividends to be paid to Mr. *Buck* absolutely, but only until further order ; and, when it was made, he was living with and maintaining his wife ; and, therefore, the late *Vice-Chancellor of England* considered that the whole of the dividends ought to be paid to him : but the circumstances of the case were now materially altered ; for Mr. *Buck* had deserted his wife, and become bankrupt ; and therefore, if there had been nothing else in the case, it would have been right to order one-half of the dividends to be paid to Mrs. *Buck*, and the other half to her husband's assignees ; but, as her husband had possessed himself of 2000*l.* stock which belonged to her absolutely, two-thirds of the dividends ought to be paid to her, for her separate use, and the other third to the assignees.

1851.

VAUGHAN
v.
BUCK.

Order made accordingly.

1851 :
20th and 21st
March :
and
16th April.

Accumulation.
Thellusson Act.

A direction in a will to accumulate the income of trust funds for twenty-one years after the testator's death, and, at the expiration of that term, during the minorities of the persons entitled under the trusts. Held to be good only for the twenty-one years.

WILSON v. WILSON.

JOHN THOMAS, by his will dated in June 1824, bequeathed his residuary personal estate to trustees, in trust to invest the same in the government stocks or funds or upon real securities; and he declared and directed that they should stand possessed of the trust monies, stocks, funds and securities, upon trust that they should, by and out of the interest, dividends and annual proceeds thereof, raise and pay to the Plaintiff, *Thomas Rogers Wilson*, the eldest son of *Moses Wilson* and *Mary* his wife, after he should have attained his age of twenty-one years and until he should have attained the age of twenty-five years, an annuity of 100*l.*; and, from and after he should have attained his age of twenty-five years, upon trust that they should, by the said ways and means, raise and pay to him, during the then residue of his life, an annuity of 500*l.*; and that, subject to the trusts thereinbefore thereof declared and directed, the trust monies, &c. should be in trust for the first son of *Thomas Rogers Wilson* who should live to attain the age of twenty-one years; and that, in case *Thomas Rogers Wilson* should have no son who should live to attain that age, then, from and after his decease or the decease or respective deceases of his son or all his sons under the age of twenty-one years, whichever should last happen, upon trust that the said trustees should, by the said ways and means, raise and pay to the Plaintiff *John Wheeler Wilson*, the second son of *Moses Wilson* and *Mary* his wife, after he should have attained his age of twenty-one years and until he should attain the age of twenty-five years, an

annuity of 100*l.*; and from and after *John Wheeler Wilson* should have attained his age of twenty-five years, upon trust that the trustees should, by the said ways and means, raise and pay to *John Wheeler Wilson*, during the then residue of his natural life, an annuity of 500*l.*; and that, subject to the trusts thereof thereinbefore declared and directed, the trust monies, &c. should be in trust for the first son of *John Wheeler Wilson* who should live to attain the age of twenty-one years; and, in case *John Wheeler Wilson* should have no son who should live to attain that age, then, from and after the decease of *John Wheeler Wilson* or the decease or respective deceases of his son or all his sons under the age of twenty-one years, whichsoever should last happen, upon trust that the trustees should, by the said ways and means, raise and pay to the Plaintiff *Richard Wilson*, the third son of said *Moses Wilson* and *Mary* his wife, after he should have attained his age of twenty-one years and until he should attain the age of twenty-five years, an annuity of 100*l.*; and, from and after he should have attained his age of twenty-five years, upon trust that the trustees should, by the said ways and means, raise and pay to him, during the then residue of his natural life, an annuity of 500*l.*; and that, subject to the trusts thereof thereinbefore declared and directed, the trust monies, &c. should be in trust for the first son of *Richard Wilson* who should live to attain the age of twenty-one years; and, in case *Richard Wilson* should have no son who should attain twenty-one, the testator declared the same trusts in favour of the Plaintiff *Henry Wilson*, the fourth son of *Moses Wilson* and *Mary* his wife, and the first son of *Henry Wilson* who should attain twenty-one, as he had before declared in favour of *Thomas Rogers Wilson*, *John Wheeler Wilson* and *Richard Wilson* and their first sons who should attain twenty-one, respectively; and, in

1851.

WILSON
v.
WILSON.

1851.

WILSON

v.

WILSON.

case *Henry Wilson* should have no son who should attain twenty-one, the testator declared the same trusts in favour of the Plaintiff *William Wilson*, the fifth son of *Moses Wilson* and *Mary* his wife, and the first son of *William Wilson* who should attain twenty-one; and, in case *William Wilson* should have no son who should attain twenty-one, the testator declared the same trusts in favour of *Septimus Wilson*, the sixth son of *Moses Wilson* and *Mary* his wife, and the first son of *Septimus Wilson* who should attain twenty-one; and the testator declared that, in case *Septimus Wilson* should have no son who should attain twenty-one, the trust monies, &c. should be in trust for his own legal personal representatives. Provided always, and he declared and directed that no annuity thereinbefore given should commence or be payable to any of the brothers of *Thomas Rogers Wilson* until after the decease or respective deceases and such failure of issue male as aforesaid of his elder brother or elder brothers, notwithstanding that he should previously have attained his age of twenty-one or twenty-five years.

And the testator declared and directed that his trustees should, for the term of twenty-one years from the time of his decease, receive the interest, dividends, and annual produce of the said trust monies, &c., and lay out and invest the same, after payment thereof of the annuity (if any) which, for the time being, should be payable thereof under the trusts aforesaid, in their names in the government stocks or funds or upon real securities, and should receive the interest, dividends and annual proceeds of the last-mentioned stocks, funds and securities, and lay out and invest the same, in their names, in or upon the like stocks, funds or securities, in order that the same interest, dividends and annual proceeds, stocks, funds and securities, and the resulting income

and produce thereof, might, from time to time, for and during the term of twenty-one years from the time of his decease, accumulate in the nature of compound interest ; anything thereinbefore contained to the contrary thereof in anywise notwithstanding, and notwithstanding the fund from which the said accumulations or any part thereof should proceed, should, prior to the determination of the said term of twenty-one years from his decease, have become vested under the trusts thereinbefore thereof declared ; and that the said interest, dividends and annual proceeds, stocks, funds and securities, and the resulting income and produce thereof respectively, and the accumulations thereof respectively, should belong to and be in trust for the person or persons who, by virtue of the trusts thereinbefore declared, should become entitled to the fund from which such accumulations should proceed, and be considered as part thereof.

Provided always, and he also declared and directed that, *from and after the expiration of the said term of twenty-one years from the time of his decease* during which such accumulations as aforesaid were directed to be made, and, *thenceforth, during the minority or respective minorities of any person or persons who, for the time being, should be entitled to the then expectant vested interest in the fund from which such accumulations should proceed*, his said trustees should receive the interest, dividends and annual proceeds of the said several trust monies, stocks, funds and securities thereinbefore mentioned, and the accumulations thereof respectively, and lay out and invest the same, after payment thereof of the annuity (if any) which, for the time being, should be payable thereof under the trusts aforesaid, in their names, in the government stocks or funds or upon real securities, *until the monies therein to be invested should*

1851.
WILSON
v.
WILSON.

1851.

WILSON

v.

WILSON.

become payable or transferable by virtue of the trusts and directions of that his will, and should receive the interest, dividends and annual proceeds of the last-mentioned stocks, funds and securities, and lay out and invest the same, in their names, in or upon the like stocks, funds and securities, in order that the same interest, dividends and annual proceeds, stocks, funds, and securities, and the resulting income and produce thereof might, from time to time, during the minority or respective minorities of any such person or persons as thereinbefore mentioned, accumulate in the nature of compound interest: and he declared and directed that the said interest, dividends and annual proceeds, stocks, funds and securities respectively, and the resulting income and produce thereof respectively, and the accumulations thereof respectively which should be received or arise and accumulate under the proviso last thereinbefore contained, should respectively belong to and be in trust for the person or respective persons during whose minority or respective minorities the same should respectively be so received or arise or accumulate.

Provided always, and the testator further declared and directed that, if any person or persons should live to attain a vested interest or vested interests in the said several trust monies, stocks, funds and securities thereinbefore mentioned, whose interest or respective interests should be subject or liable to be divested by the birth and living to attain the age of twenty-one years of any other person or persons entitled under the limitations thereinbefore contained prior to the limitations to such person or persons respectively living to attain a vested interest or vested interests, then and in such case, from and after the expiration of the said term of twenty-one years from his decease, during which such accumulations as aforesaid were directed to be made, and in the mean time

and until the birth or during the non-existence of any person entitled under the limitations to such person or respective persons living to attain a vested interest or vested interests, the interest, dividends and annual proceeds of the said several trust monies, stocks, funds and securities firstly thereinbefore directed to accumulate, and of the accumulations thereof respectively, after payment thereof of the annuity (if any) which, for the time being, might be payable thereof under the trusts aforesaid, should be paid to the person or respective persons who, having lived to attain a vested interest or vested interests as aforesaid, should be, or would have been, or might be the person for the time being entitled to the said trust monies, stocks, funds and securities, and the accumulations thereof respectively, in case no person should be born entitled to the said several trust monies, stocks, funds and securities, and the accumulations thereof respectively, under any of the limitations thereinbefore contained prior to the limitation to such person who, for the time being, might be or would have been the person entitled as aforesaid, and to the executors, administrators or assigns of such person who, for the time being, might be or would have been the person entitled as aforesaid. Provided always, and the testator declared and directed that the person who, for the time being, should, under the limitations aforesaid, be entitled to the first expectant vested interest in the said several trust monies, stocks, funds and securities firstly thereinbefore directed to accumulate, and the accumulations thereof respectively, should be educated for holy orders, and should, when he should attain the proper age for that purpose, take upon himself such holy orders accordingly; and, in the event of such person for the time being entitled to such first expectant vested interest as aforesaid being brought

1851.

WILSON

v.

WILSON.

1851.

WILSON

v.

WILSON.

up and educated for holy orders, and, from and after the decease of his father, the testator declared and directed that the costs and expences of his maintenance and education should be borne and paid by and out of the interest and dividends of the said trust monies, stocks, funds and securities, or the accumulations thereof.

The testator died on the 5th of January 1828. *Moses Wilson* was his sole next of kin. *Moses Wilson* died in May 1844; his wife, *Maria Ann Wilson*, was his executrix. *Thomas Rogers Wilson* had two sons, both of whom were infants.

The bill was filed by *T. R. Wilson* and his brothers, on the 24th of December 1849, against *Maria Ann Wilson*, and *John Wilson Wilson* and *Walter Wilson*, the sons of *Thomas Rogers Wilson*. It stated, amongst other things, that none of the Plaintiffs, except *Thomas Rogers Wilson*, had any child: that the period of twenty-one years from the testator's death, expired on the 5th of January 1849, and that *Maria Ann Wilson*, the personal representative of *Moses Wilson* who was the sole next of kin of the testator living at his death, alleged that she was entitled to some interest in the testator's personal estate and the accumulations thereof; and that, as the personal representative of *Moses Wilson*, she claimed to be entitled to the income and accumulations after the expiration of twenty-one years from the testator's death, as in the case of intestacy; but her right thereto was disputed by the parties claiming under the testator's will, and particularly by *John Wilson Wilson*. The bill prayed that the rights and interests of all parties in the accumulations, might be ascertained and determined, and that proper directions might be given for the disposition thereof.

The question was, whether the direction to accumulate after the expiration of the term of twenty-one years from the testator's death, was not contrary to the provisions of the Thellusson Act, 39 & 40 Geo. III., c. 98, and therefore void.

1851.
WILSON
v.
WILSON.

That Act enacts: "That no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated *for any longer term* than the life or lives of any such grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of any such grantor, settlor, devisor or testator, *or* during the minority or respective minorities of any person or persons who shall be living or *en ventre sa mère* at the time of the death of such grantor, devisor, or testator, *or* during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will or other assurances directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated; and, in every case where any accumulation shall be directed otherwise than as aforesaid, such directions shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

Mr. *Glasse* appeared for the Plaintiffs, but said that

1851.

WILSON

v.

WILSON.

he should not argue the question, as it arose between Co-defendants.

Mr. *Bethell* and Mr. *Elmsley* for the Defendant *Maria Ann Wilson*, said that the will directed the interest and dividends of the trust funds to be accumulated during two successive periods, namely, during the term of twenty-one years from the death of the testator, and, after the expiration of that term, during the minority or respective minorities of any person or persons who, for the time being, should be entitled to the then expectant vested interest in the trust funds; that that direction was good for the first period, but void for the second; for the language of the Thellusson Act was *disjunctive*, and the words: "for any longer term than," governed all that followed them; and, consequently, two or more of the periods mentioned in it, could not be taken in succession. They cited *Lord Southampton v. The Marquis of Hertford* (a), *Marshall v. Holloway* (b), *Ware v. Polhill* (c), *In the Matter of Lady Rosslyn's Trust* (d), *Browne v. Stoughton* (e) and *Griffiths v. Vere* (f).

Mr. *Rolt* and Mr. *Cox*, for the sons of *Thomas Rogers Wilson*, said that, in *Browne v. Stoughton* and some of the other cases that had been cited, no question arose upon the Thellusson Act, but the question was whether the trusts were not void for remoteness; that, in the present case, the trusts were admitted to be good, and it was said only that the directions to accumulate were void; that the case *In the Matter of Lady*

(a) 2 Ves. & Beam. 54.

(d) 16 Sim. 391.

(b) 2 Swanst. 432.

(e) 14 Sim. 369.

(c) 11 Ves. 257, see 283.

(f) 9 Ves. 127, see 136.

Rosslyn's Trust did not decide that only one of the periods mentioned in the Act could be taken, and there was no case in which the Court had so decided; that the word 'or,' in the 1st section of the Act, was used distributively, * and that the testator, in directing the income of the trust property to be accumulated during the minorities of the persons presumptively entitled to it, had done nothing more than the Court would have done if he had not so directed.

1851.
WILSON
v.
WILSON.
* Sic.

The *Vice-Chancellor*.—The accumulation of an infant's property directed by the Court, does not withdraw it from enjoyment. The infant enjoys the property in the only way in which he can enjoy it, namely, by being maintained out of it.

Mr. *Rolt* and Mr. *Cox* referred to the judgment in *Griffiths v. Vere*, pp. 132 and 133; 2 *Preston* on Abstracts, 179; *Hargrave* on the Thellusson Act, 114, *et seq.*; *Haley v. Bannister* (g), *Longdon v. Simson* (h), *Ellis v. Maxwell* (i), *Elborne v. Good* (j), and *Trickey v. Trickey* (k).

The VICE-CHANCELLOR :

16th April.

The point argued in this case, was as to the validity of a clause of accumulation in the will of *John Thomas*. The testator gave his residuary estate to trustees, upon trust, out of the interest thereof, to pay an annuity to his grandson, *Thomas Rogers Wilson*, the Plaintiff, and, subject thereto, in trust for the first son of *Thomas Rogers Wilson* who should attain twenty-one, and, if there

(g) 4 Madd. 275.

Beav. 104.

(h) 12 Ves. 295.

(j) 14 Sim. 165.

(i) 3 Beav. 587, and 12

(k) 3 Myl. & Keen, 560.

VOL. I. N. S.

Y

1851.

WILSON
v.
WILSON.

should be no such son, then on similar trusts for five other grandsons of the testator, brothers of *Thomas Rogers Wilson*, successively, and their sons; and if no son of any of his grandsons should live to attain twenty-one, then in trust for his own legal personal representatives. The will contains the following proviso, on which the question arises: see *ante*, pp. 291 and 292.

The Plaintiff, *Thomas Rogers Wilson*, has a son, who, if he had attained his age of twenty-one years, would (subject to the annuity given to his father) be entitled to the whole trust fund; but he is still a minor. The accumulation directed for the twenty-one years has been duly made; and the question is, whether the further accumulation directed during the minority of the son of *Thomas Rogers Wilson*, is also valid; and this depends on the single, short point, whether the Thellusson Act, as it is called, which restrains accumulation, except within certain limited periods, confines it to only one of the allowed periods, to be selected by the settlor or testator, or permits it to endure during all of them. This, I think, must be decided solely by attending to the strict grammatical construction of the Act.

Before the passing of that Act, there was no limit to the right of accumulation, except that which applied to all executory trusts. The statute says that it is expedient to make the right of accumulating, and so postponing the beneficial enjoyment of property, subject to the restrictions thereafter contained, and then enacts as follows: see *ante*, p. 295. The line thus drawn is altogether arbitrary; and there is no clue whatever, enabling us to say what liberty of accumulation was meant to be left unaffected, except the words of enactment themselves. Whatever be the ordinary grammatical meaning of these

words, will be as completely consistent with the expressed intention of the Act, as any other construction on which the Court might speculate, as being more likely to have been the real meaning of those who framed the clause. Under these circumstances, I do not feel myself warranted in doing more than construing the words according to their plain grammatical import; and I own it seems to me to be quite clear that, so proceeding, only one of the permitted periods can be taken. The Act says it is expedient that the power of accumulation shall be restricted in manner hereinafter mentioned; that is, no rents or profits of real or personal property shall be accumulated for any longer term than period A, or period B, or period C, or period D. Surely an accumulation during period B, and, at the end of that period, a further accumulation during period D, is an accumulation beyond any permitted period. The Defendants would read the Act as if it had restrained accumulation beyond periods A, B, C, and D; not reading the word 'or' in its ordinary disjunctive sense, but as a copulative. This, however, is taking a liberty with language which, I apprehend, is never done, certainly not in modern times, where there is nothing in the context showing that to have been the sense in which the word has been used. It is admitted that there is no authority directly in point; but, in the absence of direct authority, I think the observations of Lord *Eldon* in *Griffiths v. Vere*, are entitled to very great weight. The scope of his observations there was that, in spite of the Act, accumulation might go on, partly under the Act and partly under the general principles of law, for nearly double the period of twenty-one years; and he adds, though the Legislature did not mean that; that is, though the Legislature has, by enactment, restricted accumulation to a period of twenty-one years from the death of the testator, yet general princi-

1851.

WILSON

v.

WILSON.

1851.

WILSON

v.

WILSON.

ples of law may carry it through a far longer period. This surely is very strong to show that Lord *Eldon's* opinion was that the statutable accumulation, if it may be so designated, must have stopped at the end of twenty-one years ; otherwise, he would have pointed out the subsequent accumulations which, according to the argument before me, might go on, consistently with the statute, for a succession of minorities after the expiration of twenty-one years. I must, however, add that I do not found my judgment on that case. I proceed entirely on these considerations: that the ordinary grammatical construction of the Act restricts the accumulation to one only of the allowed periods ; that there is nothing on the face of the Act showing that the ordinary construction of the words is not to be adopted, and that such a construction leads to no absurdity or inconsistency. I am, therefore, of opinion that the direction to accumulate during the minority of the son, and the subsequent gift of the fund so accumulated, are void ; and therefore, that the annual produce during such minority is undisposed of, and goes to the next of kin.

THE KING. OF THE TWO SICILIES
v. WILLCOX.

1851 :
16th and 31st
January.

THE bill was filed in December 1849, against the Peninsular and Oriental Steam-packet Company and *L. Scalia* and *F. M. Granatelli*, and certain other persons. It stated, among other things, that, in the early part of 1848, certain persons, subjects of the Plaintiff, usurped the Plaintiff's authority and regal functions, and established, in *Palermo*, a government constituted of the Plaintiff's subjects, which assumed the administration of public affairs in *Sicily*, and continued to exercise

Production of documents.
Principal and agent.
Defendant.
Discovery.

During a revolution in *Sicily*, the revolutionary government sent two of the Defendants, who were

natives and inhabitants of *Sicily*, as envoys to this country, and afterwards, remitted to them monies, which had been contributed by many thousands of the inhabitants of *Sicily*, with directions to purchase a steam-ship therewith; and the Defendants applied the monies accordingly. The lawful sovereign of *Sicily*, after he had re-established his authority, filed a bill, claiming the ship, which still remained in the port of London. The Defendants, in their answer, admitted the possession of documents relating to the matters in the bill, but said that they held them *as the agents and on the behalf of the persons who intrusted them with the monies*, and submitted that, *in the absence of such persons*, they ought not to be ordered to produce the documents.

The Court, however, made the order, because the Plaintiff represented the contributors of the monies; and the revolutionary government being at an end, the Defendants had either ceased to be agents or trustees for any one, or had become agents or trustees for the Plaintiff.

Production of Documents.—Defendant.—Discovery.—Penalties.
A Defendant, a foreigner sojourning in this country, declined to produce documents, because they would expose him to criminal prosecution in his own country; but the Court made the order.

Defendant.—Witness.

A Defendant or witness, if interrogated as to matters tending to criminate him, may decline to answer at any time, notwithstanding what he has disclosed, may be sufficient to convict him. The decision in *Ewin v. Osbaldiston*, 6 Sim. 608, disapproved of.

1851.

KING OF THE
TWO SICILIES

v.

WILLCOX.

it until April 1849; that the usurping government seized the Plaintiff's royal public treasury in *Palermo*, and took possession of all the monies therein, and of all monies which were paid into the same, being part of the Plaintiff's royal revenues, thenceforwards until April 1849: that, shortly before July 1848, the ministers of the usurping government appointed *Granatelli* and *Scalia*, both of whom were the Plaintiff's subjects, to be their agents in *England*; and *Granatelli* and *Scalia* proceeded to *England* as such agents; and, shortly before, or at the beginning of July 1848, they, by the direction and on the behalf of the usurping government, entered into a contract with the Peninsular and Oriental Steam-packet Company for the purchase of two steam-ships, one of which was built and nearly completed, and the other was being built; and that such contract was reduced into writing, and dated the 1st of July 1848, and was signed by the secretary of the Company on behalf of the Company, and by *Granatelli* and *Scalia*; and *Granatelli* and *Scalia*, who were therein described as commissioners for the Sicilian Government, thereby agreed to buy, and the Steam-packet Company thereby agreed to sell, the steam-ship called the *Vectis*, built at *Cowes*, for 45,000*l.*, and another steam-ship, which was then being built for the Company at *Northfleet*, and was afterwards called the *Bombay*, for 60,000*l.*, to be paid by certain instalments, the second instalment to be paid when the two steam-vessels should be completed for sea, so far as related to the Company, in the same state as contracted for by the builders; and any alterations required, by the purchasers, for war purposes, were to be made by them at their own expense: that, in the margin of the contract, was written the following memorandum:—"It is stipulated by the contracting parties, that this agreement is subject to ratification by the Sicilian Government, in all

July current:" That the usurping government was informed of the contract, and, on the 20th of July 1848, declared that it ratified the same; that *Granatelli* and *Scalia* having been informed of such ratification, a memorandum was, on the 7th of August, 1848, indorsed on the contract and signed by them and by the secretary to the Steam-packet Company on behalf of the Company, in the following words:—" *The Sicilian Government* having, under date *Palermo*, the 20th of July 1848, *ratified the within agreement, the same is now declared to be valid and in full force.* London, 7th August, 1848." That by the words "*The Sicilian Government*" was meant (as the Steam-packet Company well knew) the persons who had usurped the Plaintiff's authority, and were then assuming and exercising the offices and functions of his ministers: that the *Bombay* had since been so far completed as to be ready for sea: that, in the latter part of July and in August 1848, the usurping government, and persons for the time being acting under the alleged authority thereof, from time to time, applied divers sums of the Plaintiff's revenues, being monies paid into his royal public treasury at *Palermo* of which they had taken possession as aforesaid, in purchasing or procuring bills of exchange, for the express purpose of such bills being remitted to *England*, and applied towards completing the purchase of the steam-ships; and the persons for the time being acting under the alleged authority of such government, procured such bills to be so made out or indorsed as to be payable to the order of *Granatelli* and *Scalia*; and the persons acting under such alleged authority remitted the same bills to *Granatelli* and *Scalia*, with directions to apply the same towards completing the purchase of the steam-ships; and they received such bills, and applied the same, or the amount thereof, in paying, to the Steam-packet Company,

1851.

KING OF THE
TWO SICILIES
v.
WILLCOX.

1851.

KING OF THE
TWO SICILIES

v.

WILLCOX.

(who well knew how and whence the said money was obtained) the instalments payable under the contract and certain other sums in respect of the purchase; that the Steam-packet Company delivered the *Vectis* to *Granatelli* and *Scalia*, or to certain officers and sailors employed by them; and the same ship was, pursuant to directions given by *Granatelli* and *Scalia* as agents of the usurping government, taken away, in March 1849, from *England* to, and the same had ever since remained in parts beyond the seas; that the *Bombay* had, ever since the building thereof was completed, been and still was in the port of *London*, and the same remained, until May 1849, in the possession or under the power of the Steam-packet Company: that, in April 1849, the Plaintiff's lawful authority was re-established in *Sicily*, and the Plaintiff had thenceforth continued in the undisturbed exercise of such authority; that monies taken from the Plaintiff's royal public treasury at *Palermo* and which belonged to the Plaintiff as such sovereign as aforesaid, and bills, purchased or procured with such monies, having been, with the knowledge of the Steam-packet Company, applied in or towards paying the purchase-money for the *Vectis* and the *Bombay*, the Plaintiff became entitled to require the delivery to him of the same ships, and was still entitled to have the *Bombay* delivered to him: that the Steam-packet Company entered into the contract for the sale of the steam-ships, with full notice and knowledge that *Granatelli* and *Scalia* were acting therein on behalf of the usurping government; and the same Company received all payments made to them in respect of the purchase-money for the same ships, with full notice and knowledge that such payments were made with or by means of monies taken out of the Plaintiff's royal public treasury at *Palermo*, and belonging to the Plaintiff as such sovereign as aforesaid. The bill charged that

the Defendants had then, or at some time had in their custody, possession, or power, the before-mentioned contract, and divers letters and other communications which had passed between some of the Defendants and others of them, and between the Defendants or some or one of them, and their or his agents or agent, and between the Defendants or some or one of them, and some other persons or person ; and divers deeds, documents, books, accounts, letters, copies of and extracts from letters, and divers memorandums, papers and writings relating to the matters thereinbefore mentioned, or some of them ; and that, if the same were produced, the truth of the matters aforesaid would appear. The bill prayed that the Defendants might be decreed to deliver the *Bombay* to the Plaintiff ; and that, in the mean time, the Defendants, their agents and servants, might be restrained, by the injunction of the Court, from delivering the *Bombay* to any person or persons without the consent of the Plaintiff, and from causing or permitting the same to be taken out of *England*, and from making any preparation for so doing, and from parting with the possession or control thereof without the Plaintiff's consent ; and from making and executing, or causing or permitting to be registered, any bill of sale, or other disposition of, and from doing or suffering to be done any other act affecting the same ship, unless with the consent of the Plaintiff.

Granatelli and *Scalia*, in their answer, said that they were natives and inhabitants of *Sicily* and entitled to the benefit of the laws, usages and constitution existing and established in that island ; and that neither of them was a subject of or amenable to the laws of the kingdom of *Naples* ; that, before the eleventh century, there was established in *Sicily*, and the said island had ever since of right had, and then of right had a constitution, by which

1851.
KING OF THE
TWO SICILIES
v.
WILLCOX.

1851.
 KING OF THE
 TWO SICILIES
 v.
 WILLCOX.

the supreme power was vested in a King, jointly with a Parliament consisting of temporal and spiritual barons and lords, and representatives of and chosen by the commons of the island ; that, in 1816, *Ferdinand*, the then King of *Sicily*, repudiated the constitution, and refused to acknowledge the Parliament of *Sicily*, or the authority thereof, and assumed to himself the title of *Ferdinand*, King of the Kingdom of the Two *Sicilies*, without the consent of the Parliament, and claimed to reign in *Sicily* as an absolute monarch, in the same manner in which he reigned in *Naples* ; that *Ferdinand* having repudiated and subverted the constitution of *Sicily*, became a usurper of the throne of *Sicily* and not the rightful King ; that, upon his death in 1825, his son, *Francis of Bourbon*, in like manner, and without the assent of the Parliament and against the will of the people of *Sicily*, claimed and assumed to be King of the Kingdom of the Two *Sicilies*, until his death in 1830 ; that, since his death, the Plaintiff had styled himself *Ferdinand* the Second, King of the Kingdom of the Two *Sicilies*, and as such had claimed the island of *Sicily* as part of his dominions ; that any authority which the Plaintiff had exercised in *Sicily*, had been exercised without the sanction or concurrence of the Parliament, and against the will of the people and by force and constraint, which he was enabled to use by means of the Neapolitan troops kept by him in the island ; that, on the 12th of January 1848, the people of *Sicily*, being unable any longer to endure the unlawful tyranny and oppression of the Plaintiff, rose up in arms for the purpose of overthrowing his authority and expelling his troops from *Sicily*, and restoring a government conformable to the constitution, and they commenced and waged, in due form, against the Plaintiff and his troops, a just and regular war, and, within a few days, defeated his forces ; that the war extended over the whole island, until April 1848, and,

before the end of that month, the people of *Sicily* took possession of all the towns, castles, and fortresses in the island except the citadel of *Messina*, which was impregnable, and defeated all the Plaintiff's troops and garrisons in *Sicily*, except a few troops who took refuge in the citadel of *Messina*; that, at the commencement of the war, a provisional committee of government was chosen, by the people, to take the necessary steps for re-establishing a constitutional government in lieu of that of the Plaintiff; that the provisional government summoned the general Parliament of *Sicily*; that the provisional government found, in the treasury, an inconsiderable sum of money, which had arisen from the public taxes; that the Parliament of *Sicily* assembled at *Palermo* on the 20th of March 1848; that, from the time of the appointment of the provisional government, all the powers and authorities of the Plaintiff in *Sicily* absolutely ceased, and his rights and property (if any) there, became and were, by the laws of war, confiscated; and the supreme power in the island was, thenceforward, vested in the provisional government and in the Parliament and in the executive government appointed by the government; that, by a decree duly made and issued by the Parliament, on the 13th of April 1848, it was declared that the Plaintiff and his dynasty had for ever forfeited the throne of *Sicily*, and that *Sicily* adopted a constitutional form of government; that, pursuant to a decree of the Parliament of *Sicily*, of the 26th of March 1848, the President of the government appointed a minister of foreign affairs and commerce, a minister of war and marine, a minister of finance, a minister of worship and justice, a minister of the interior and public safety, and a minister of public instruction and public works; that the proceedings of the Parliament and people of *Sicily* for the defence and restoration of the constitution, were recognised and admitted by the governments of Her Bri-

1851.
 KING OF THE
 TWO SICILIES
 v.
 WILLCOX.

1851.
 KING OF THE
 TWO SICILIES
 v.
 WILLCOX.

tannic Majesty and of *France*; and two mediations were undertaken by or on behalf of those two governments, between the Plaintiff and the Parliament and executive government of *Sicily*, which mediations proved unsuccessful, and the war between the people, Parliament and government of *Sicily*, and the Plaintiff and his Neapolitan troops, was regarded as, and in fact was a just and regular war between two contending parties; and the flag of the Parliament and executive government, was recognised and saluted by the ships of war and naval officers of Her Britannic Majesty; that, in April 1848, the President of the executive government of *Sicily*, appointed and despatched the Defendants from *Palermo* to *London*, as *commissioners or envoys* to Her Majesty's government, with a letter of introduction to Her Majesty's minister for foreign affairs. * * * That an expedition was undertaken, by the Plaintiff, for the conquest of *Sicily*, and large numbers of Neapolitan troops were, in September 1848, landed in *Sicily*, and attacked *Messina*, which, after much resistance, was, in open war, taken by the Plaintiff; that the Plaintiff's troops then proceeded to conquer other parts of the island, when an armistice, by the mediation of the representatives of the British government and of *France*, was agreed to between the Plaintiff and the executive government of *Sicily*, which continued until April 1849, and then terminated; that, upon the termination of the armistice, the plaintiff's troops recommenced the war, and obtained possession of the castles, cities and towns of *Sicily*; and, by the force of war and by conquest, and against the will of the Parliament and people of *Sicily*, established the power of the Plaintiff over the island; and the Plaintiff still continued to exercise the power so established; that the Parliament of *Sicily* had adjourned, but had never been dissolved, and no proceeding could be taken with respect to the revenue

or property of the island, except with the sanction and under the authority of the Parliament ; that, during the proceedings before stated, many thousands of the natives and inhabitants of *Sicily* contributed and paid, *under the sanction of the Parliament and executive government*, various sums, to a very large amount, out of their own monies, into a fund for the purpose, amongst other things, of purchasing steam-ships in *England*; and that, inasmuch as such steam-ships were to be purchased in *England*, and as the Defendants had come to and were in *England* as aforesaid ; a sufficient part of the money so contributed, was remitted, as thereafter mentioned, through the executive government of *Sicily* to the Defendants in *England*, to purchase and pay for two steam-ships, and was received by the defendants to be applied by them *upon and for such trust and purpose ; and no part of the money so contributed or remitted ever belonged to the Plaintiff, or belonged to or came out of his treasury or revenues, or the treasury or revenues to which he or any King of Sicily was or could be entitled ; and that the Defendants were trustees of the money so remitted, and were answerable to the persons who contributed the same and intrusted them therewith, and to such persons only* : and the Defendants submitted, *that no decree or order could be made in this suit, (constituted as it was,) touching the said monies or the application thereof* : and the Defendants denied, for the reasons before stated, that the Plaintiff had been for several or any number of years, or that he then was the lawful sovereign of the kingdom of the Two *Sicilies*, or that the whole or any part of the island of *Sicily* had ever formed part of such kingdom ; and they said that *Sicily* was and always had been, and of right ought to be, a separate and independent kingdom ; and they denied, for the reasons before stated, that the said island or any part thereof,

1851.
 KING OF THE
 TWO SICILIES
 v.
 WILLCOX.

1851.

KING OF THE
TWO SICILIES

v.

WILLCOX.

had ever formed part of the territories rightfully subject to the Plaintiff's sovereignty; or that the Plaintiff was entitled to any part of the revenue of the said alleged kingdom, or to the administration thereof; or that, in the early part of 1848 or before July in such year, or at any time, certain persons, being subjects of the Plaintiff, or any persons did usurp the Plaintiff's authority or regal functions; or that the people of *Sicily* were subjects of the Plaintiff, or that the government established on the overthrow of the Plaintiff's authority, was a usurping or unlawful government, or, for the reasons aforesaid, that either of the Defendants was a subject of the Plaintiff. The Defendants further said that they were appointed and despatched in the manner at the time and under the circumstances thereinbefore stated, and that they proceeded to *England* accordingly; but they denied, save as aforesaid, that the ministers of the alleged usurping government, did, shortly before July 1848 or at any time, appoint them, to be *their agents* in *England*, or that they proceeded to *England* as such agents: and they said that they did, at the beginning of July 1848, *on behalf of the people of Sicily who had contributed to the said fund* as thereinbefore mentioned, *and by their direction* communicated through the said executive government, but not otherwise by the direction or on behalf of the government in the bill called the usurping government, enter into a contract with the Steam-packet Company, for the purchase of two steam-ships, *in pursuance of the trust thereinbefore stated*, and that such contract was to be subject to ratification by the executive government as representing the parliament and the persons who had contributed the said monies as aforesaid, but was not otherwise to be subject to ratification by the government in the bill called the usurping government, and such contract, made under such circumstances *and trust as*

thereinbefore mentioned, was reduced into writing, and bore date the 1st of July 1848, and was signed by the secretary to the Company, on behalf of the Company, and by the Defendants: that the purport or effect of such contract, made under such circumstances *and trust* as aforesaid, was such as in the bill mentioned; and that such memorandum as in the bill mentioned was written in the margin of the contract; and that the executive government, as representing the parliament *and the persons who had contributed to the said fund*, but not otherwise the government in the bill called the usurping government, did, on the 20th July 1848, on being informed of the contract, declare that such government ratified the same; and such memorandum as in the bill stated, was, on the 7th of August 1848, on the defendants being informed of such ratification, indorsed on the contract: that by the words, *The Sicilian government*, was meant (as, they believed, the Steam-packet Company well knew) the said executive government and the said persons forming the same who intervened in and concluded the contract in the manner and under the circumstances before stated: and they denied that, by those words, were meant such persons as in the bill mentioned or referred to; and they denied, also, that the alleged usurping government or any persons acting under the authority thereof, or any person or persons applied any sums of the Plaintiff's revenues in purchasing or procuring bills of exchange for the purpose of such bills being remitted to *England* or applied towards completing the purchase of the *Vectis* and the *Bombay*, or for any such purpose. They said that the persons forming the executive government, acting in furtherance of the said object of the people of *Sicily* by whom the fund was contributed, did, at various times beginning in the end of July 1848 and

1851.
KING OF THE
TWO SICILIES
v.
WILLCOX.

1851.
KING OF THE
TWO SICILIES
v.
WILLCOX.

ending in March 1849, apply various sums, out of the fund so contributed, in purchasing or procuring bills for the purpose of their being remitted to *England*, and which bills, or the proceeds thereof were to be and were applied towards completing the purchase of the *Vectis* and *Bombay*; and they denied that such monies, or any of them, were monies paid into the Plaintiff's royal public treasury at *Palermo*, of which such government and persons had, as alleged, taken possession as aforesaid. The Defendants further said that the persons for the time being acting under the authority of the executive government, procured the bills, purchased with the monies contributed and entrusted to them in manner and for the purposes aforesaid, to be so made and indorsed as to be payable to the order of the Defendants and remitted the same to the Defendants, with directions to apply the same towards completing the purchase of the steam-ships; and that the Defendants received such bills and applied the same accordingly; that the Steam-packet Company, did, after receiving the second instalment of the purchase-money for the ships, deliver the *Vectis* to the Defendants, *who were entrusted to buy and receive the same as aforesaid*, and to certain officers and sailors employed by them; and that the same ship was, pursuant to directions given by the Defendants, taken away in March 1849, from *England* to parts beyond the seas; and that such directions were given by the Defendants, *as entrusted with the purchase and custody of the said ship* in the manner and under the circumstances aforesaid, *and not as agents of the government in the bill called the usurping government*: and that the *Bombay* had, ever since the building thereof remained and it still remained in the port of London. The Defendants denied that the Plaintiff's lawful authority was ever established in *Sicily*; or that

he was in the undisturbed exercise of such lawful authority ; or, save as thereinbefore stated, in the exercise of any authority ; or that he was entitled to have the *Bombay* delivered to him ; and they claimed that ship in trust for the persons entitled to the monies contributed for the purchase of it, and who entrusted them with the purchase. They further said that the Plaintiff, having, in manner and under the circumstances aforesaid, by force of arms, taken possession of *Sicily*, appointed and constituted a commission or court of inquiry to examine into the accounts of the monies sent from *Sicily* to the Defendants as before-mentioned, with a view of compelling them and the ministers of the executive government, to pay the said monies to the Plaintiff ; and that, on the 19th of December 1849, the said commission or office pronounced a decree, *ex parte*, condemning the Defendants and the ministers, to pay the amount of the bills, which had been purchased and remitted to the Defendants as before stated, into the royal treasury of *Sicily*. The Defendants said, in answer to the interrogatory as to their having documents in their possession or power relating to the matters mentioned in the bill, that they had, in their possession or in that of their solicitors, the particulars mentioned in the schedule to their answer, and which related, in parts of them, to the matters mentioned in the bill ; but they denied that, by such particulars or by any of them, the truth of such matters or of any of them, would appear to be otherwise than as was stated in their answer ; and they said that they held such particulars *as the agents and on the behalf of the persons by whom they were intrusted, with the monies thereinbefore mentioned ;* and they submitted that, in the absence of such persons, they ought not to be ordered to produce the said particulars or any of them ; they said also that they entirely denied the title of the

1851.
 KING OF THE
 TWO SICILIES
 v.
 WILLCOX.

1851.
 KING OF THE
 TWO SICILIES
 v.
 WILLCOX.

Plaintiff to the *Bombay*, or that, from the said particulars or any of them, such title would, in any way, appear or be evidenced; and that the particulars mentioned in the first part of the schedule, were confidential communications which passed between them and the persons in *Sicily* whose agents in this country they had been, and were confidential papers and documents held by them as agents for such persons; and that the production of the particulars in the first part of the schedule or any of them, would be a breach of trust and confidence in the Defendants towards the said persons in *Sicily*, and would also, as they believed and had been advised, expose and render subject both such persons and also the Defendants themselves, to criminal prosecution, punishment and penalties in *Sicily*, in respect of the part taken, by such persons and by the Defendants, in the struggle against the Plaintiff thereinbefore mentioned, and would be capable of being used and would be used, by the Plaintiff, as evidence against such persons, and against the Defendants *when within the Plaintiff's jurisdiction*, in such criminal prosecution: and they claimed the protection of the Court against the production of the particulars last mentioned.

Mr. *Bethell* and Mr. *Goldsmid*, for the Plaintiff, now moved for the production of the documents mentioned in the schedule to the answer.

With reference to the first objection made by the Defendants to the production of the documents; namely, that they ought not to be ordered to produce them in the absence of the persons who intrusted them with the monies which they had applied in purchasing the steam ships, they said that the answer admitted that the fund from which those monies were taken, was contributed,

under the sanction of the parliament and the executive government of Sicily, by many thousands of the natives and inhabitants of *Sicily*, for the purpose of purchasing steam-ships: that it was paid to the executive government, and that part of it was remitted, to the Defendants, *by the executive government*, for the purchase of steam-ships; consequently, the fund was admitted to be a public fund, and to have been raised for public purposes: that, though the answer represented the government of the Plaintiff to be unlawful, and the government formed in 1848, to be a lawful one, and the war which the Sicilians had waged against the Plaintiff, to be a lawful war; yet the Courts of this country could not so regard them; but must consider the Plaintiff (whose right to the throne of *Sicily* had been recognised by this country) as the lawful sovereign of that island, and the war as a rebellion: that the only person in a country who could represent public rights, was the lawful sovereign of that country; and, as the fund was admitted to be a public fund and to have been raised for public purposes, the objection to the production of the documents, founded on the absence of the persons who had contributed to the fund, fell to the ground: *Jones v. Garcia del Rio* (a), *Thompson v. Powles* (b), *Taylor v. Barclay* (c), *Hullett v. The King of Spain* (d).

1851.
 KING OF THE
 TWO SICILIES
 v.
 WILLCOX.

With reference to the objection that the documents, if produced, would expose the Defendants, and also the persons who had intrusted them with the monies, to criminal prosecution, penalties and punishment in *Sicily*, the Plaintiff's Counsel said that the Defendants did not

(a) Turn. & Russ. 297.

(b) 2 Sim. 194.

(c) *Ibid.* 213.

(d) 2 Bligh, N. S., 31. See Lord Redesdale's judgment.

1851.
 KING OF THE
 TWO SICILIES
 v.
 WILLCOX.

state that they were in *Sicily* or that they ever intended to return to that island: that *the possibility* of their going there and being there indicted, was not a sufficient excuse for the non-production of the documents: that the Defendants were safe in this country, and that, as it had been decided that a party who was protected from penalties by lapse of time, must produce documents, a Defendant who was protected by place, must produce them: that, if a bill were filed for an account of dealings in a speculation in opium in *China*, the Defendant could not protect himself, from answering, on the ground that he should be exposed to penalties if he went to *China*: that there was no case in which the objection to answering or producing documents, had been founded on penalties inflicted by the law of a foreign country: that the Court could not be conversant with any law except the law of *England*, and could not judge as to the liability of a party to penalties under the law of a foreign country: *Dolder v. Lord Huntingfield* (e): that, even if the government formed in *Sicily* in 1848, had been a lawful one, the Plaintiff would have become entitled, by conquest, to its rights: *The Advocate General of Bombay v. Amerchund* (f).

Mr. *Rolt* and Mr. *Cairns*, for the Defendants.

The Defendants swear, most distinctly, that they hold the documents in question *as agents* for the persons who intrusted them with the monies which they applied in purchasing the steam-ships. Those persons are not before the Court; therefore the Court cannot order the Defendants to produce the documents: *Taylor v. Rundell* (g),

(e) 11 Ves. 283.

Cases, 329, n.

(f) 1 Knapp's Privy Coun.

(g) Cr. & Ph. 104.

Murray v. Walter (h). The war which the Sicilians waged against the Plaintiff, was not a rebellion, but a civil war. The Plaintiff was the aggressor. He had violated the constitution of the island; and the inhabitants took up arms for the purpose of restoring it. They defeated the Plaintiff's troops, overthrew his authority, and established a government in conformity to the constitution. The proceedings of the inhabitants were countenanced and supported by our government; the flag of the parliament and executive government was recognised and saluted by our officers and ships of war, and the Defendants were received in this country as envoys. Therefore the government that sent them was recognised, by the government of this country, as a legitimate one. It is true that the Plaintiff has subverted that government; but, in so doing, he must be regarded, by the Courts of this country, as a wrong-doer, and, consequently, as not having acquired any right to property in this country, which, but for his wrongful act, he would not have had a shadow of title to. This Court, therefore, ought not to interfere in any manner on his behalf.

1851.
 KING OF THE
 TWO SICILIES
 v.
 WILLCOX.

With respect to the second objection to the motion, we say that the Defendants are natives and inhabitants of *Sicily*, and that they are residing in this country for a temporary purpose only; and therefore they must be presumed to have the *animus redeundi*; and the Court must assume, from the facts stated in their answer, that, if they do return, they will be exposed to criminal prosecution, and that the documents, if produced, will further that prosecution. Besides, the Courts of this country receive evidence of the laws of a foreign country. The

1851.

KING OF THE
TWO SICILIES

v.

WILLCOX.

case put of a person who had been engaged in smuggling opium into *China*, has reference to a native of this country, as to whom there is no ground for presuming an intention to return to *China*. The principle in cases like the present, is that a party is not bound to criminate himself. That principle applies, whether the party is amenable to the laws of a foreign country, or to the laws of this country. The contingency of the penalty makes no difference; for all penalties are contingent, and the contingency is the very thing that induces the Court to protect the party: *Brownsword v. Edwards* (i), *Harrison v. Southcote* (j), *Maccallum v. Turton* (k).

Mr. *Bethell*, in reply.

From the commencement to the termination of the proceedings mentioned in the pleadings, the Plaintiff was the lawful sovereign of *Sicily*, and was recognised as such by this country. It is true that the exercise of his authority was suspended for a short time; but he never ceased to be King of *Sicily*, nor did this country ever recognise any other power. Some letters are set out, in the answer, as having proceeded from authorized agents of the British government; but there is no distinct averment, nor is it the fact, that the revolutionary government of *Sicily* was ever recognised by Her Britannic Majesty. The Plaintiff, being now restored to his throne, is entitled to the benefit of all the acquisitions and contracts made by the rebellious government. The Defendants say that they hold the documents as agents for the persons who intrusted them with the money, with which they purchased the ships. But the Plaintiff says, in effect, that he adopts the contract which the Defendants en-

(i) 2 Vez. 243. (j) 1 Atk. 528. (k) 2 Youn. & Jerv. 183.

tered into with the Steam-packet Company for the purchase of the ships, and therefore the Defendants are become his agents, and the documents which they hold are his documents. This Court cannot recognise a subject as having a *status* in opposition to his lawful sovereign.

With respect to the liability to penalties and to criminal prosecution, I have to observe, first, that the Defendants cannot be placed in jeopardy, except by their own voluntary act; and, if they were now in jeopardy, they could not withhold the documents from a person who is the owner of or has an interest in them. Secondly, the protection of third persons has never been considered as a ground for withholding documents. Lastly, the Defendants have admitted the whole *corpus delicti* in the body of their answer: *Ewing v. Osbaldiston* (m).

1851.
KING OF THE
TWO SICILIES
v.
WILLCOX.

The VICE-CHANCELLOR :

I cannot decide this case, satisfactorily to myself, without looking through the bill and answer.

There are two points of very great nicety in point of law. In the first place, the two Defendants in whose hands the documents are, say: "They are not our property, but they are the property of certain persons who exercised the functions of a provisional government in *Sicily*, and who remitted to us certain monies which had been contributed by many thousands of the inhabitants of that island, for the purpose of purchasing steam-ships, and we employed those monies according to the directions of our principals." And the first objection made to the production of these documents, is this: "You cannot ask us to produce documents that are not our own documents, but

1851.

KING OF THE
TWO SICILIES

v.

WILLCOX.

are documents that we hold in trust for others." That I take to be a good objection, if, instead of its being a case of rebellion, it had been a case in which six persons in *Sicily*, having succeeded in getting a subscription from thousands of others, had remitted the money to these parties, to purchase steam-ships; for then, no doubt, the parties in this country would be mere agents. But, if the persons who remitted the monies, are members of an unlawful government, and, after they have exercised the functions of government for some time, the legitimate government conquers them, my present impression is that that government will succeed to the rights of the government they conquered, and, *inter alia*, to the contracts that that government had entered into, and the property it had purchased; and the agents for the unlawful government will become agents for the lawful government: it will succeed to the agency as well as to the property.

With regard to the second objection to the motion, I confess that I was surprised to hear that a Defendant may say he will not answer anything that will subject him to penalties in a foreign country, particularly if that country is his native country. I do not, however, mean to say, at present, that it may not be so. But I cannot accede to the last authority quoted by Mr. *Bethell*: for a majority of the Judges decided, in *Garbett's case*(n), that, if a witness is asked as to matters which may subject him to penalties, he may stop at any time, although

(n) Their Lordships held that it made no difference in the right of the witness to protection, that he had, before, answered in part; their Lordships being of opinion that he

was entitled to claim the privilege at any stage of the inquiry: *Regina v. Garbett*, 2 Carr. & Kirw. N. P. Cases, 474.

what he has disclosed may be ample evidence to convict him. I cannot reconcile that with the decision in *Ewing v. Osbaldiston*.

The VICE-CHANCELLOR :

The bill alleges that, from the month of March 1848 up to the month of April 1849, the government of *Sicily* was usurped by certain of the Plaintiff's subjects, who, during that period, exercised the functions of government, to the exclusion of the Plaintiff, their rightful sovereign : That the usurping government, while it so exercised the functions of government, employed the Defendants *Granatelli* and *Scalia*, as their agents or commissioners in this country, and remitted to them, from time to time, large sums of money, part of the royal revenues of the Plaintiff in his treasury at *Pulermo*, to be employed in the purchase of two steam-ships, called the *Vectis* and the *Bombay*, for the use of the usurping government : That the said Defendants accordingly entered into contracts in this country for the purchase of the said two ships, from the Peninsular and Oriental Steam-packet Company (who are made Co-defendants), and actually obtained possession of the *Vectis*, and sent it to *Sicily*, and paid over the money so remitted to them, to the Company, in discharge of the price agreed to be paid for the purchase of the *Vectis*, and on account of the money agreed to be paid for the *Bombay* which was nearly ready for sea : That, in or about the month of April 1849, the Plaintiff regained possession of the island of *Sicily*, and was restored to all his rights of sovereign thereof, and so became entitled to the steam-ships and the benefit of the said contracts entered into by the usurping government through the agency of *Granatelli* and *Scalia*. The bill prays for an injunction to restrain

1851.
KING OF THE
TWO SICILIES
v.
WILLCOX.
31st January.

1851.

KING OF THE
TWO SICILIESv.
WILCOX.

the Defendants from parting with the possession of the *Bombay* without the consent of the Plaintiff.

Granatelli and *Scalia*, by their answer, admit the facts stated in the bill as to the seizure of the government of *Sicily* by divers subjects of the Plaintiff; but they say that the persons who so took possession of the government, could not properly be designated as a usurping government, because the Plaintiff had violated the rights of his Sicilian subjects, by acting in a manner not warranted by the fundamental laws of that country; and they state and rely on various circumstances leading to that conclusion, and showing or intended to show that, whilst the so-called usurping government held supreme sway in the island, it exercised *de facto* the functions of government, and was recognised by various European States. With reference to the immediate subject of this suit, namely, the purchase of the steam-ships, the case made by the answer is that though it is true that the so-called usurping government took possession of the money in the royal treasury at *Palermo*, yet that no part of that money was employed in the purchase of the ships, but only in discharging the ordinary expenses of government; and that many thousands of the inhabitants of *Sicily* contributed and paid, under the sanction of the parliament and of the executive government, large sums, into a fund for the purpose (*inter alia*) of purchasing steam-ships; and that a sufficient part of that fund was remitted, through the executive government of *Sicily*, to the Defendants in this country, to be by them applied in the purchase of two steam-ships; and the Defendants therefore submit that they are accountable, for such money, only to the persons by whom the same was contributed, and that no decree can be made in this suit,

constituted as it is, and to which the persons by whom the money was remitted, are not parties. With regard to the contract for the purchase of the steam-ships, they say: "that these Defendants did, at the beginning of July 1848, on behalf of the people of *Sicily* who had contributed to the fund hereinbefore mentioned, and by their direction, communicated through the said executive government, but not otherwise by the direction or on behalf of the said government in the bill called the usurping government, enter into a contract or agreement with the Defendants, the Peninsular and Oriental Steam-packet Company, for the purchase of two steam-ships in pursuance of the trust hereinbefore stated ; and such contract or agreement was to be subject to ratification by the executive government as representing the parliament and the persons who had contributed the monies as aforesaid, but was not otherwise to be subject to ratification by the government in the bill called the usurping government ; and such contract or agreement made under such circumstances and trust as hereinbefore mentioned, was reduced into writing, and did bear date the 1st day of July 1848, and was signed by the Defendant *Charles Wellington Howell* (the secretary), on behalf of the said Company, and by them these Defendants ; and that the short purport or effect of such contract, made under such circumstances and trust as aforesaid, was such as is in the bill in that behalf mentioned, and such memorandum as in the bill in that behalf mentioned, was written in the margin of such contract ; and the said memorandum was in such words and figures or of or to such purport or effect as in the bill in that behalf mentioned." It becomes necessary, therefore, to refer to the bill ; and, by the bill, it is stated that the contract bore date the 1st of July 1848, and was signed by the secretary of the Company, and by *Granatelli* and *Scalia* ; and that the short purport or effect of

1851.
KING OF THE
TWO SICILIES
v.
WILLCOX.

1851.
 KING OF THE
 TWO SICILIES
 v.
 WILLCOX.

such written contract, was that *Granatelli* and *Scalia*, who were therein described as commissioners for the Sicilian government, thereby agreed to buy, and the Peninsular and Oriental Steam-packet Company thereby agreed to sell the steam-ship called the *Vectis*, built at *Cowes*, for 45,000*l.*, and also the least advanced of the two steam-ships then building for the said Company at *Northfleet*, for 60,000*l.*, to be paid as follows:—20,000*l.* on the ratification of the agreement, as thereafter mentioned, and the further sum of 20,000*l.* when the two steam-vessels should be completed for sea, so far as related to the said Company, in the same state as contracted for by the builders; and that any alterations required by the purchasers for war purposes, should be made by them at their own expense; and that the balance of the purchase-money, with interest at 5*l. per cent. per annum*, should be paid by bills, or such security as might be approved of by the Company, in two equal payments at three and six months date, on the delivery of the vessels; and it was thereby also agreed that, upon completion of the purchase, bills of sale should be made out and executed, and that the steam-vessels, with what belonged to them, should be delivered according to the specification therein referred to: and in the margin of such written contract, was written the memorandum following; that is to say: “It is stipulated, by the contracting parties, that this agreement is subject to ratification by the Sicilian government, in all July current.” And the Defendants say that the contract was ratified by the government: they say that the executive government, as representing the parliament and the persons who had contributed to the fund as aforesaid, but not otherwise the government in the bill called the usurping government, did, on the 20th of July 1848, on being informed of the contract, declare that such government ratified it, and a memorandum was, on the 7th of August 1848, on

the Defendants having been informed of such ratification, endorsed on the contract, and signed by the Defendants, and by the secretary to the Company on behalf of the Company, and such memorandum was in the words and figures, or of or to the purport or effect in the bill in that behalf mentioned; and the Defendants say that, by the words: "the Sicilian government," was meant, as they believe the Company well knew, the executive government, and the persons forming the same, who intervened in and concluded the contract in the manner and under the circumstances therein stated. The Defendants then state the mode in which the money was remitted to them in this country. They say: "That the persons forming the executive government, acting in furtherance of the object of the people of *Sicily* by whom the fund hereinbefore mentioned was contributed, did, at various times beginning in the end of July 1848 and ending in March 1849, apply various sums, out of the fund so contributed as aforesaid, in purchasing or procuring bills for the purpose of their being remitted to *England*, and in paying and providing for bills drawn, in *England*, on *Palermo*, *Paris* and *Marseilles*, which bills, or the proceeds thereof, were to be paid and were applied towards completing the purchase of the said steam-ships, the *Vectis* and *Bombay*; but they deny that such monies, or any of them, were monies paid into the Plaintiff's royal public treasury at *Palermo*, of which such government and persons had, as alleged, taken possession as aforesaid." That same statement is repeated once or twice. Then they say: "That, in the month of December 1849, the persons forming the said executive government, did, in furtherance of the object of the people of *Sicily* by whom the fund hereinbefore mentioned was contributed, apply sums, amounting to 20,000*l.* and up-

1851.
 KING OF THE
 TWO SICILIES
 v.
 WILLCOX.

1851.

KING OF THE
TWO SICILIES

v.

WILLCOX.

wards, out of the fund so contributed as aforesaid, in purchasing bills on *England*, to go towards paying for the said steam-ships." The Defendants then state certain proceedings which have taken place in *Sicily* since the Plaintiff has re-established his authority there, whereby the Defendants, as the parties to whom the funds were remitted in this country, and certain members of the executive government by whom the same were sent, were declared responsible for the same; and that a commission or office, on the 19th of December 1849, pronounced, *ex parte*, a decree condemning the Defendants and the members of the executive government, jointly and severally, to pay, to the royal treasury of *Sicily*, the amount of the bills of exchange which were sent to the Defendants to pay for the steam-ships. The answer admits that the *Vectis* was paid for and sent to *Sicily* during the continuance of the executive or usurping government; and that large sums have been paid, by the Defendants, out of the monies remitted to them, on account and towards the purchase of the *Bombay*: and then, with reference to the charge as to documents, the Defendants say (see *ante*, 313 and 314).

The question on this answer, is whether the Plaintiff is entitled to call on the Defendants to produce the documents in their possession. As the answer admits that the documents relate to the matters in question in the Cause, the Plaintiff is, *prima facie*, entitled to see them. But the motion was resisted on two grounds: first, because the Defendants say they hold the documents merely as trustees or agents for the persons by whom they were entrusted with the money, and so ought not, in their absence, to be compelled to produce them; and, secondly, because, as to the documents in the first part of the

schedule, their production would subject the Defendants themselves, and the persons by whom the money was remitted, to criminal proceedings in *Sicily*.

1851.
KING OF THE
TWO SICILIES
v.
WILCOX.

I am of opinion that neither of these grounds is tenable. With respect to the first, there seems to me to be a studied ambiguity in the language of the answer. The Defendants say they hold the documents as agents and on behalf of the persons by whom these Defendants were entrusted with the monies. Whom do they mean to designate by these words? The several thousand inhabitants of *Sicily* by whom, they say, the funds were subscribed, or the executive government who commissioned the Defendants to purchase the ships? Not, surely, the former; there was no privity between them and the Defendants. The people by whom the money was raised, trusted the then existing government with the funds, leaving it to them to purchase the ships. The answer represents the Defendants as having acted on behalf of the people, that is to say, the whole people of *Sicily*, and by their direction communicated through the then government. Now, it is absurd to speak of a whole people, as *cestuis que trust*, to be made parties to a suit in this Court. If they can be treated as *cestuis que trust*, it is obviously impossible that they should appear or be represented here otherwise than by their government. Have the Defendants, then, a right to say that the persons who carried on the government when the money was remitted to *England*, are their *cestuis que trust*, and so that, in their absence, they, as being merely their agents, ought not to be called on to produce the documents? I think not. Every government, in its dealings with others, necessarily partakes, in many respects, of the character of a corporation. It must, of necessity, be treated as a body having perpetual succes-

1851.
 KING OF THE
 TWO SICILIES
 v.
 WILLCOX.

sion. It would not be represented by all or any of the individuals of whom it is, from time to time, composed. The answer shows, with respect to the provisional government, that, during the time of the transactions in question, material changes took place as to the persons who from time to time exercised its functions. It is impossible to say that the Defendants ever were agents of all or any of the individuals who, from time to time, composed that government. Those who, as constituting the government, stood, if they did stand, in the relation of *cestuis que trust* or of principals towards the Defendants, ceased to fill that character when they ceased to be members of the government; so that, the executive government being now at an end, either the Defendants have ceased to fill the character of trustees or agents at all, or they have become trustees or agents for the Plaintiff, as the person now in possession of the supreme authority. The case may be likened to that of a person who had, in his hands, property entrusted to him by a corporation. If, by the death of all the members of the corporation, or by Act of Parliament, or otherwise, the corporation should come to an end, it surely could not be contended that the party entrusted with the property, could be made responsible to the individuals, or the representatives of the individuals, who constituted the corporation when the trust was created. Reasoning from analogy, I am of opinion that the Defendants are not, in any sense, the agents or trustees of the individuals who composed the government by whom the funds were remitted. If they are trustees or agents at all, they are trustees or agents for the Plaintiff, and not for the persons from whom, as constituting the government for the time being, they received the funds. This point, that is to say, the necessity of making Co-defendants the persons by whom the money was remitted to *England*,

was raised by the demurrer for want of parties. The demurrer was overruled by the late *Vice-Chancellor of England* (o), and that decision would of itself be decisive of this branch of the Defendants' objection, unless, by the answer, some new facts are stated, showing the necessity of making parties persons who were not so shown by the bill. I think, for the reasons I have shortly adverted to, that, in this respect, there is no material difference between the bill and the answer.

1851.
KING OF THE
TWO SICILIES
v.
WILLCOX.

The second point is one on which I have not been able to discover any authority. But, on principle, I think that the objection is untenable. The Defendants, it will be observed, say that the production of the documents might subject certain persons in *Sicily*, as well as themselves, to highly penal consequences. It is hardly necessary to say that, so far as the objection relates to the consequences which the discovery might entail on others, it would not hold even if the penalties would be incurred in this country. The privilege is confined to penal consequences likely to be occasioned to the party himself: *nemo tenetur seipsum prodere*: but there is no privilege against disclosing matter within the knowledge of the party, merely because it might subject other persons to punishment. Can the Defendants then object to answer that which might subject themselves to penal consequences if they should go to *Sicily*? I think not. The rule relied on by the Defendants, is one which exists merely by virtue of our own municipal law, and must, I think, have reference, exclusively, to matters penal by that law: to matters as to which, if disclosed, the Judge would be able to say, as matter of law, whether it could or could not entail penal consequences. As, for instance,

(o) See *post*, page 334.

1851.

KING OF THE
TWO SICILIES

v.

WILLCOX.

if a witness were to say: "I decline to answer that question, because it may show that, five years ago, I exercised an office without first taking the oaths," the Judge would be able to say, as matter of law: "That cannot subject you to penal consequences, by reason of the subsequent Indemnity Acts." So, where an Act of Parliament has passed, indemnifying witnesses from prosecution on account of matters to which their evidence is thought necessary, if a witness, ignorant of the statute, were to object to answer a question, because it might subject him to penalties covered by the statute, the Judge would be able to say: "That it is a mistake of the law; you are exposed to no such penalties, and must therefore answer." And very many similar cases may be suggested. But, in respect of penal consequences in a foreign country, this cannot be. No Judge can know, as matter of law, what would or would not be penal in a foreign country; and he cannot, therefore, form any judgment as to the force or truth of the objection of a witness, when he declines to answer on such a ground. In the present case, indeed, there will probably be no difficulty in believing that the Defendants are speaking quite truly; as the documents may, in all probability, form links in a chain of evidence which might enable the Courts in *Sicily* to convict the Defendants of high treason. But, if the principle is once admitted, it must be admitted in all its ramifications. Thus, for instance, in a bill against a firm, some of whom, though resident here, are Spanish subjects, seeking an account of mercantile transactions in *Spain*, the Defendants might refuse to set out an account of their transactions, on account of the dealings having been (as probably they would have been) to a great extent, contraband, and so tending to subject them to penalties for having infringed the fiscal law of *Spain*. The case was put, at the bar, of a bill for an

account of an opium transaction in *China*; and instances might be multiplied, to almost any extent, by ascertaining, as matter of fact, what acts, by the laws of any foreign country, are penal, though not so here, and which might become the subject of investigation in our Courts. The impossibility of knowing, as matter of law, to what cases the objection, when resting on the danger of incurring penal consequences in a foreign country, may extend, furnishes very strong and, to my mind, satisfactory evidence that the objection cannot be sustained. It is to be observed that, in such a case, in order to make the disclosure dangerous to the party who objects, it is essential that he should first quit the protection of our laws, and wilfully go within the jurisdiction of the laws he has violated. Now, in the present case, the parties objecting are Sicilian subjects; and so the probability of their returning to *Sicily* may be great. But, if the objection is once, in such a case, admitted, it is very difficult to say why it should not apply to an Englishman, who, having been in a foreign country and there violated the law (by smuggling for instance), afterwards returns home. He may intend to go abroad again, and then the discovery which he is here called on to make, might, there, subject him to penalties.

I am of opinion, for these reasons, in the absence of all authority on the point, that the rule of protection is confined to what may tend to subject a party to penalties by our own laws; and so that the objection in the present case, cannot be sustained. The consequence is that the Plaintiff is entitled to the usual order for production of all the documents.

1851.
 KING OF THE
 TWO SICILIES
 v.
 WILLCOX.

1850 :

KING OF THE
TWO SICILIES

v.

WILLCOX.

1850 :

28th and 29th
January and 8th
February.Foreign sove-
reign.Parties and
pleading.
Earmark.

The government formed during a revolution in Sicily, seized upon the King's treasure, and re-mitted part of it to persons in this country, to purchase steam-ships; and they applied the remittance accordingly.

Held that the King, who had re-established his authority, was entitled to sue for one of the ships, which remained in the port of London, and that the persons who made the remittance were not necessary parties to the suit.

The judgment referred to *ante*, page 329, was delivered by the late *Vice-Chancellor of England*, on a demurrer filed by the Defendants, *Brodie Willcox* and *John Mudie*. The grounds of the demurrer were want of equity, and because the members of the revolutionary government of Sicily who intrusted the Defendants, *Granatelli* and *Scalia*, with the monies with which they purchased the steam-ships, were not made parties to the suit.

Mr. *Rolt* and Mr. *Cairns*, in support of the demurrer, cited *Chitty's* translation of *Vattel*, book iii. sects. 196, 204, 206, 207, 208, 292, 293, and 295. *Puffendorf*, book viii. chap. vi. sect. 23 (a), and chap. xii. sect. 3. *Lindo v. Lord Rodney* (b), *Elphinstone v. Bedreechund* (c) and *Barclay v. Russell* (d).

Mr. *Bethell* and Mr. *Goldsmid*, in support of the bill, cited *Taylor v. Plumer* (e), *Scott v. Surman* (f), *The City of Berne v. The Bank of England* (g), *Dolder v. Lord Huntingfield* (h), *Wheaton* on Internat. Law, vol. i., pages 98, 99 and 100. *The Advocate-General of Bombay v. Amerchund* (i), *Ogden v. Folliot* (j), *Quincil. Institut. Orator.* lib. v. sect. 10, *Gesner's* edit. pages 295, *et seq.* *The King of Spain v. Machado* (k), *The King of Spain v. Hullett* (l), *Chitty's Vattel*, book iii. sects. 293 and 294, *Thompson v. Powles* (m), *Taylor v.*

(a) Referred to in 3 Ves. 427.

(b) 2 Doug. 613, n. (1).

(c) 1 Knapp's Privy Council Cases, 316.

(d) 3 Ves. 424; see 433 and 434.

(e) 3 Mau. & Sel. 562.

(f) Willes, 400.

(g) 9 Ves. 347.

(h) 11 Ves. 283.

(i) 1 Knapp, P. C. C. 329, note.

(j) 3 T. R. 726.

(k) 4 Russ. 225.

(l) 1 Bligh, N. S., 31.

(m) 2 Sim. 194.

Barclay (n), *Jones v. Garcia del Rio* (o), *Glyn v. Soares* (p), 12 Charles II. c. 11, s. 31, *Muclean v. Dunn* (q), and *Foster v. Bates* (r).

1850.
KING OF THE
TWO SICILIES
v.
WILLCOX.

Sir L. SHADWELL, V. C.:

In this case of *The King of the Two Sicilies v. Willcox*, I have referred to all those passages which were cited in support of the demurrer: and I must say it appears to me that the language that has been referred to, and which is to be found in *Puffendorf* and *Vattel*, does not apply to the case. There is no case, upon the record, of belligerent parties. The case upon the record is a simply told tale, uniform from beginning to end, of the rebellious subjects of an absolute sovereign having taken the opportunity of the state of rebellion, to possess themselves of some part of that royal property which belonged to the Plaintiff as King. He succeeded in putting down the rebellion; and the parties who were in rebellion against him, having made use of their actual power, over the royal fund, to send it, in the shape of bills, to this country, did not acquire, thereby, any right to the property as against their sovereign. And it appears to me extraordinary, after the cases of *The Nabob of the Carnatic v. The East India Company* (s), and *The King of Spain v. Hullett*, that there should be any difficulty raised upon the proposition: because it seems, to my mind, to be laid down as clear as any proposition can be, that the independent sovereign of a state is competent, in this country, to sue for his personal rights. That appears to me, therefore, to decide, in effect, the great question upon this record. And this

(n) 2 Sim. 213.

(o) Turn. & Russ. 297.

(p) 3 Myl. & Keen, 450.

(q) 4 Bing. 722.

(r) 12 Mees. & Wels. 226.

(s) 1 Ves. Jun. 371.

1850.

KING OF THE
TWO SICILIES

v.

WILLCOX.

bill is constructed only for the purpose of following, by what I may call the doctrine of ear-mark, that property which, having been taken once by the rebellious subjects of the King of the *Two Sicilies*, was sent by them into this country, in such a manner that, by the doctrine of ear-mark, possession may be traced to certain persons who are Defendants upon the record. In that respect then, the demurrer must be overruled.

With respect to the objection that was made for want of parties: it does not appear to me that there is any want of parties upon the record. The rebellious subjects, certainly, are not necessary parties to the record; but those are made parties to the record who, through the instrumentality of the rebellious subjects while they were in a state of rebellion, did, unlawfully and improperly, acquire possession of the King's property.

Therefore, the demurrer must be overruled.

1850:

23rd and 24th
April and 22nd
May.Corporation.
Penalties.An incorporated
Company de-

murred to a bill, because the discovery thereby sought might subject it to criminal prosecution under the 59 Geo. III. c. 69 (to prevent the enlisting of his Majesty's subjects for foreign service, and the fitting out, in his Majesty's dominions, vessels for warlike purposes without his licence).

The Court held that a corporation was not liable to be indicted under that Act, and overruled the demurrer.

Another demurrer was filed, by the Steam-packet Company (who were a body corporate), to certain parts of the bill; because the discovery thereby sought, would subject the Company to pains and penalties and to criminal prosecution under 59 Geo. III. c. 69, s. 7: which

enacts that, if any person within the United Kingdom shall, without the leave and licence of his Majesty, equip, furnish, fit out or arm, or procure to be equipped, furnished, fitted out or armed, or aid or assist or be concerned in the equipping, furnishing, fitting out or arming any ship or vessel, with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, state or potentate, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, with intent to cruise or commit hostilities against any state, prince or potentate, with whom his Majesty shall not then be at war, every such person so offending, shall be deemed guilty of a misdemeanour, and shall, upon conviction thereof, upon any information or indictment, be punished by fine or imprisonment, or either of them, at the discretion of the Court in which such offender shall be convicted.

1850.
KING OF THE
TWO SICILIES
v.
WILLCOX.

Mr. Stuart, Mr. Chandless, and Mr. Willes appeared in support of the demurrer, and

Mr. Bethell and Mr. Goldsmid in support of the bill.

Sir L. SHADWELL, V. C., said that in some cases, such as not repairing a bridge, or not complying with an order of justices, a corporation might be liable to be indicted; but those cases were exceptional; and the general law of *England* was that a corporation could not be indicted for crime: that, since the case was argued, he had consulted a learned Judge, who coincided with him in the opinion which he had formed; namely, that the Steam-packet Company could not be indicted under the Act referred to: and he was confirmed in that view, by

1850.
 KING OF THE
 TWO SICILIES
 v.
 WILLCOX.

the language of the Act, which referred to individuals only: consequently, the demurrer must be overruled.

1851 :
 15th and 16th
 April.

Copyright.
 Periodical
 work.

RICHARDSON v. GILBERT.

Under the Act to amend the law of copyright, 5 & 6 Vict. c. 45, actual payment for an article written for a periodical work, is a condition precedent to the vesting of the copyright, in the proprietor of the work : a *contract* for payment is not sufficient.

ON the hearing of a motion to dissolve an injunction, by which the Defendant was restrained from infringing the copyright claimed, by the Plaintiffs, in an article originally published in the *Dublin Review*, of which the Plaintiffs were the proprietors, the question was whether actual payment, for the article, to the composer of it, was a condition precedent to the vesting of the copyright in it in the proprietors of the Review.

That question arose under the 18th section of the 5 & 6 Vict. c. 45; which enacts that, when any publisher or other person shall, before or at the time of the passing of the Act, have projected conducted and carried on, or shall hereafter project, conduct and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same or any volumes, parts, essays, articles or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles or portions, shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher or conductor, *and paid for by such proprietor*, projector, publisher or conductor; *the copyright in every such* encyclopædia, review, maga-

zine, periodical work and work published in a series of books and parts, and in every volume, part, essay, *article and portion so composed and paid for, shall be the property of such proprietor*, projector, publisher or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given, to the authors of books, by this Act ; except only that, in the case of essays, articles or portions forming part of and first published in reviews, magazines or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form, shall revert to the author for the remainder of the term given by this Act.

1851.
 RICHARDSON
 v.
 GILBERT.

Sir *W. Page Wood*, S.-G., and Mr. *Renshaw*, in support of the motion, said that the bill did not sufficiently show that the copyright in the article was vested in the Plaintiffs ; inasmuch as it did not allege that the Plaintiffs *had paid for the article: Brown v. Cooke (a)* and *Spottiswoode v. Clarke (b)*.

Mr. *James Parker* and Mr. *Bagshawe*, for the Plaintiffs, said that *a contract* to pay the author for the article, was sufficient to vest the copyright in the proprietors of the Review, and that actual payment was not required, by the Act, for that purpose.

The VICE-CHANCELLOR was, at first, inclined to be of that opinion ; but, after taking time to consider the point, he held that actual payment for the article was made, by the Act, a necessary condition to the vesting of the copyright therein in the proprietors of the

(a) 11 Jur. 77.

(b) 2 Phill. 154.

1851.
 RICHARDSON
 v.
 GILBERT.

Review. His Lordship, however, was of opinion that the title of the Plaintiffs, did sufficiently appear upon the bill; inasmuch as it alleged, first, that the article was composed, for the Plaintiffs, by a person employed by them to compose the same, on the terms that the copyright therein should belong to the Plaintiffs, and should be paid for by them (which was an advance towards a good title); and, afterwards, that the Plaintiffs were then entitled to the exclusive property and copyright in the article; which, regard being had to the first averment, implied that the Plaintiffs had paid, the composer, for the article.

Motion refused without costs.

1851:
 May 7th.
Wesleyan
chapel.
Mortgagor and
mortgagee.
Trustees.

THE ATTORNEY-GENERAL v. HARDY.

The trust deeds of certain Wesleyan Methodist chapels, contained powers of raising money, by mortgage, for the purposes of the trusts.
 Held that

any of the trustees of the chapels might be mortgagees under this power, and that, if they were such mortgagees, they might exercise all the rights of mortgagees, although in opposition to the trusts.

IN this suit, which was instituted by an information and bill, a motion was made that the Defendants *William Hardy Cozens Hardy, David Curteis, Thomas Johnson, John Farthing, Robert Burcham, John Randall, George Turner, Jeremiah Earl, James Searles, William Birchum the younger, Joseph Colman, and William Hill Ramm* might be restrained from further preventing and interrupting the use and enjoyment of the chapel and premises at *Holt*, in the county of *Norfolk*, comprised in the indenture of the 1st of July 1814 in the information and bill mentioned, for the purpose of preaching

and expounding God's holy word, and performing any other act of religious worship therein, by the Plaintiffs *William Worker* and *Robert George Bancroft*, during the continuance of their appointment by the Conference of the people called Methodists, or, after the termination of such appointment, by other the persons who might be, thereafter, duly appointed by the said Conference for the like purposes, or by any other persons duly authorized with the consent of the Plaintiff *William Worker*, as the superintendent preacher of the *Holt* circuit in the information and bill mentioned, or by the superintendent preacher for the time being of the circuit within which the said chapel and premises were or might be situate: and that the said Defendants *William Hardy Cozens Hardy*, *David Curteis*, *Thomas Johnson*, *John Farthing*, *Robert Burcham*, *John Randall*, *George Turner*, *Jeremiah Earl*, *James Searles*, *William Bircham* the younger, *Joseph Colman*, and *William Hill Ramm* might be restrained from permitting or allowing any person or persons whomsoever to have the use and enjoyment of the said chapel and premises, on any occasion, for the purpose of preaching and expounding God's holy word or performing any act of religious worship therein, other than and except the said Plaintiffs or other the persons for the time being appointed as aforesaid by the Conference, or such other persons as might have been duly authorized by the Plaintiff, *William Worker*, or by other the superintendent preacher for the time being of the circuit within which the said chapel and premises might be situate: and that the said Defendants *William Hardy Cozens Hardy*, *David Curteis*, *Thomas Johnson*, *John Farthing*, *Robert Burcham*, *John Randall*, *George Turner*, *Jeremiah Earl*, *James Searles*, *William Bircham* the younger, *Joseph Colman*, and *William Hill Ramm* might be restrained from executing or procuring to be executed any agreement or con-

1851.

ATT.-GEN.

v.

HARDY.

1851.
 ATT.-GEN.
 v.
 HARDY.

veyance or other deed, and from paying or receiving any money for the purpose of carrying into execution the sale or pretended sale in the information and bill mentioned to have been made, by auction, on the 14th day of June 1850, of the trust premises comprised in the indenture of the 1st day of July 1814, and that the Defendants *David Curteis* and *Thomas Johnson*, and also the said Defendants *William Hardy Cozens Hardy*, *John Farthing*, *Robert Burcham*, *John Randall*, *George Turner*, *Jeremiah Earl*, *James Searles*, *William Bircham* the younger, *Joseph Colman*, and *William Hill Ramm* might be restrained from further or otherwise acting or assuming to act in the trusts of the same indenture; and that the Defendants *William Hardy Cozens Hardy*, *David Curteis*, *Thomas Johnson*, *John Farthing*, *Robert Burcham*, *John Randall*, *George Turner*, *Jeremiah Earl*, *James Searles*, *William Bircham* the younger, *Joseph Colman*, and *William Hill Ramm* might be restrained from further or otherwise acting or assuming to act under the trusts of the indenture of the 28th day of October 1837 in the information and bill mentioned: and that the Defendant *Josiah Hill*, might be restrained from continuing or proceeding with his action of ejectment in the information and bill mentioned; and from otherwise proceeding to recover the possession of the said several trust premises in the information and bill mentioned, or any part thereof.

Sir *W. Page Wood*, S.-G., Mr. *Bethell*, Mr. *Rolt*, and Mr. *Little*, supported the motion.

Mr. *Stuart* and Mr. *Craig* opposed it for all the Defendants named in the notice, except *Josiah Hill*; and

Mr. *Malins* and Mr. *Berkeley* opposed it for *Josiah Hill*.

The VICE-CHANCELLOR delivered the following judgment, in which the facts of the case and the arguments are stated :—

1851.
 ATT.-GEN.
 v.
 HARDY.

This was an information at the relation of the Rev. *William Worker* and the Rev. *George Badcock*, and a bill by these same relators, as Plaintiffs on behalf of themselves and all other persons entitled under the trusts of two several deeds of the 1st of July 1814 and the 28th of October 1837, mentioned in the pleadings. The Defendants are the surviving trustees of both those deeds, together with certain other persons whose interests in the matters in question I need not now advert to. The object of the suit is to establish both the above-mentioned deeds, and to restrain the Defendants from doing certain things alleged to be in violation of the trusts thereby reposed in them.

The material facts necessary for a due understanding of the case made by the information and bill, are as follows.—By a deed of the 1st of July 1814, a certain chapel, then lately erected at *Holt* in the county of *Norfolk*, was conveyed to a large body of trustees, in fee, upon trust to raise, by mortgage of the premises, all such sums as had then been expended in purchasing and erecting the chapel, and all such further sums as should be necessary for keeping the premises in repair; and, subject thereto, upon trust to permit the chapel to be used, exclusively, by Methodist preachers duly appointed by the Methodist Conference, holden annually according to the provisions of a deed-poll of the 28th February 1784, under the hand and seal of *John Wesley*, and duly enrolled in this Court, being the deed organizing the body of persons commonly known by the appellation of Wesleyan Methodists. The deed of 1814 contains a proviso that if, at any time, the

1851.

ATT.-GEN.

v.

HARDY.

major part of the trustees, should be of opinion that a larger or more convenient chapel should be necessary, then they should sell the chapel thereby conveyed, to any person willing to purchase the same. These are all the trusts which, for the present purpose, it is necessary to state. The funds applied for the purchase of the ground and the erection of the chapel, appear to have been advanced, chiefly, by one of the trustees, *William Hardy*; but no security was taken by him, for his advances, till the year 1821. By an indenture of mortgage dated the 7th November in that year, and reciting that *William Hardy* had advanced large sums in and towards the erection and completion of the chapel, amounting to 700*l.*, and that such advances had been made on an agreement that the repayment thereof should be secured as thereafter mentioned, the then surviving trustees demised the chapel to *Jeremiah Cozens*, a trustee for *William Hardy*, for a term of 1000 years, in order to secure to him the repayment of the 700*l.* and interest. On the 12th of November 1833, *Hardy* signed a memorandum on the back of the mortgage, whereby he admitted the receipt of 350*l.* part of the 700*l.*; so that the principal sum then remaining due, was reduced to 350*l.* It was stated, at the bar, that this sum of 350*l.* so acknowledged to have been received, was not, in fact, received by *William Hardy*, though, for the benefit of the chapel, he agreed to admit such to have been the case. I do not think this material. From the date of that memorandum, it must be taken that the debt was reduced to 350*l.* It seems that the numbers of Methodists at *Holt* increased, materially, between the years 1814 and 1837; and it became necessary or expedient, for their accommodation, to erect a larger and more commodious chapel; and, accordingly, by an indenture dated the 28th of October 1837, a piece of ground, with a chapel then in the course of being erected thereon, was

conveyed to a number of trustees, who agreed to stand seised thereof upon trusts corresponding with those contained in a deed of the 3rd of July 1832; being a deed whereby a chapel at *Skircoats*, in the parish of *Halifax* in the county of *York*, was conveyed to trustees upon trust for the benefit of the society of Methodists at that place, and which deed, having been settled with great care, has, ever since, been treated as the model on which all subsequent deeds have been framed; and the same is now commonly known and referred to as, "*the model deed*." The only trusts of the model deed so incorporated with the deed of October 1837, to which it is necessary to refer, are the trusts for permitting the use of the chapel by the preachers named by the Conference, and the trusts for mortgaging. Those clauses are as follows: "And upon further trust, from time to time and at all times after the erection thereof, to permit and suffer the said chapel or place of religious worship, with the appurtenances, to be used, occupied and enjoyed as and for a place of religious worship, by a congregation of Protestants of the said people called Methodists, in the connection established by the said late *John Wesley* as aforesaid, and for public and other meetings and services held according to the general rules and usage of the said people called Methodists; and do and shall, from time to time and at all times hereafter, permit and suffer such person and persons as are hereinafter mentioned or designated, and such person and persons only, to preach and expound God's holy word, and to perform the usual acts of religious worship therein; that is to say, such person and persons as shall be from time to time approved, and, for that purpose, duly appointed by the said Conference of the said people called Methodists, from time to time held under the orders and regulations of the said in part recited deed poll; and also such

1851.
ATT.-GEN.
v.
HARDY.

1851.

ATT.-GEN.

v.

HARDY.

other person and persons as shall be, thereunto, from time to time duly permitted or appointed (according to the general rules and usage of the said people called Methodists) by the superintendent preacher for the time being of the circuit in which the said chapel or place of religious worship shall, for the time being, be situated ; and also such other person and persons as shall be, thereunto, from time to time duly appointed, by any authority lawfully constituted by the said Conference or under or by virtue of these presents, to fill up any vacancy or vacancies, at any time occasioned by the death, removal, or suspension of a preacher or preachers in or during any interval between the sittings of the said Conference, but only until the then next Conference, and, in no case, any other person or persons whomsoever.”

——“ And it is hereby declared that, from time to time and at all times hereafter, it shall and may be lawful to and for the trustees for the time being of these presents or the major part of them, to mortgage and, for that purpose, to appoint, convey and assure, in fee or for any term or terms of years, the said piece of ground, chapel or place of religious worship, hereditaments and premises or any part or parts thereof respectively, to any person or persons whomsoever, for securing such sum or sums of money as may be requisite or necessary in or for the due execution and accomplishment of the trusts and purposes of these presents or any of them, according to the true intent and meaning thereof. Nevertheless it is hereby declared that no mortgage or mortgages, nor any disposition whatsoever by way of mortgage, shall, at any time hereafter, be made of the said trust premises or of any part or parts thereof, under or by virtue of these presents, unless such mortgage or mortgages shall, in the aggregate, amount to and cover the whole debt or the aggregate amount of the whole of

the debts, which, at the time of the execution of such mortgage or mortgages, shall be due and owing, either legally or equitably, in respect or on account of or in relation to the said trust premises or some part or parts thereof respectively, or from the said trustees for the time being or any of them, for, or on account or in respect of the said trust premises or some part or parts thereof respectively, excepting only such debt and debts as then may be accruing due for or on account of the ordinary current expenses of the said chapel or place of religious worship and premises: But it is hereby declared that it shall not be incumbent upon any mortgagee or mortgagees, or upon any intended mortgagee or mortgagees of the said trust premises or any part or parts thereof, to inquire into the necessity, expediency or propriety of any mortgage or mortgages which shall be made or be proposed to be made under or by virtue of these presents, or whether the same is or are made or intended to be made for the whole amount of the debt, or of the aggregate amount of the debts which shall be so due and owing as aforesaid: Nor shall anything in these presents contained, or which may be contained in any such mortgage or mortgages, extend or be construed to extend, unless where the contrary shall, with the full knowledge and consent of the said trustees for the time being or the major part of them, be therein actually expressed, to hinder, prevent or make unlawful the taking down, removing, enlarging or altering the said buildings and premises, or any of them respectively, as is in these presents before mentioned and provided for in that behalf, nor, in any manner, to hinder, prevent or interfere with the due execution of the trusts or purposes of these presents or any of them, so long as such mortgagee or mortgagees, his, her and their heirs, executors, administrators and assigns, shall not be in

1851.

ATT.-GEN.

v.

HARDY.

1851.

ATT.-GEN.

v.

HARDY.

the actual possession, as such mortgagee or mortgagees, of the hereditaments comprised or to be comprised in such mortgage or mortgages; anything in these presents contained to the contrary, in anywise notwithstanding." They do not, in truth, materially vary from the trusts created, as to the old chapel, by the deed of the 1st July 1814. *William Hardy* was not one of the trustees of this new chapel, but the funds for its erection seem to have been, in great measure, supplied by him; and, by an indenture of the 26th day of May 1838, the trustees of the new chapel demised it to *Joseph Colman*, as a trustee for *William Hardy*, in order to secure him a sum of 500*l.* therein stated to have been then advanced, by him, for erecting the chapel. In point of fact, it appears, from the affidavits, that he really advanced considerably more than this amount, but he agreed to treat the advance as a sum of 500*l.* only. This mortgage was made in strict conformity to the trusts of the model deed; and so, clearly, gave, to *William Hardy*, or rather to *Colman* as his trustee, a valid mortgage title to the extent of 500*l.* It should be stated that this sum of 500*l.*, was made up, in part, by a transfer of 150*l.* from the debt due on the mortgage of the old chapel. A large part of the fittings and fixtures of the old chapel, estimated to be of the value of 150*l.*, were removed to the new chapel, whereby the value of the former was lessened by that sum; and it was, therefore, agreed, by all parties, that this should be treated as a payment, to *William Hardy*, of 150*l.* on account of his mortgage on the old chapel, and an advance by him to the trustees of the new chapel. The whole sum thus advanced by *William Hardy* to the trustees of the new chapel (including the 150*l.*) was agreed to be taken as 500*l.*, and was secured by the mortgage to *Colman*. And, in further pursuance of this arrangement, *Hardy*

on the 5th January 1839, signed a second memorandum on the back of the mortgage deed of the old chapel, whereby he acknowledged to have received a further sum of 150*l.* in reduction of the original mortgage debt of 700*l.* On the same day, *Hardy* made a further advance of 100*l.*, to the trustees of the new chapel, for which they, by an indorsement on the mortgage of 1838, agreed to execute to him a mortgage of the new chapel. The result of all these transactions, was that *Jeremiah Cozens*, the trustee named in the mortgage of the old chapel, became entitled to that mortgage as a security for a sum of 200*l.* due to *Hardy*, being the balance of the original sum of 700*l.*, after deducting therefrom the two sums of 350*l.* and 150*l.*; and *Joseph Colman*, the trustee named in the mortgage of the new chapel, became entitled to hold that mortgage as a security, to *Hardy*, for the two sums of 500*l.* and 100*l.*, making together 600*l.* In this state of things *William Hardy* died on the 22nd of June 1842, having, by his will, appointed his nephew the Defendant *William Hardy Cozens Hardy*, and *Jeremiah Cozens* who was the trustee of the mortgage of the old chapel, his executors. They both proved his will, and, on the 29th January 1849, *Jeremiah Cozens* died, having, by his will, made the Defendant *William Hardy Cozens Hardy* his executor. *Hardy* proved his will, and so became entitled to the mortgage term of 1000 years, created by the deed of the 7th November 1821, as well as the money thereby secured. He also became entitled, as surviving executor of *William Hardy* deceased, to the mortgage debt of 600*l.* secured by the term of 1000 years in the new chapel vested in *Joseph Colman*.

1851.
ATT.-GEN.
v.
HARDY.

Such being the state of the title to the property in the two chapels, it is important, in order to understand

1851.
ATT.-GEN.
v.
HARDY.

the nature of the complaint made by the Information and Bill, that attention should be directed to the general nature of the organization of the Wesleyan body, as it was finally settled by the deed poll of the 28th February 1784 to which I have already adverted. According to the provisions of that deed, the whole body is divided, in its ultimate subdivisions, into small sections called classes, each presided over by a class leader. Several classes constitute a society, and several societies are united into what is called a circuit; and, lastly, several circuits constitute a district. The supreme governing authority of the whole, is called the Conference, which consists of a body of a hundred preachers, renewed, by self-election, whenever vacancies occur. The Conference meets every year in the month of July or August; and it then appoints preachers for the ensuing year to preach in all the chapels throughout the kingdom. The Conference, at its meeting in 1850, appointed the Plaintiffs, *Worker* and *Badcock*, to be the preachers for the several societies in the *Holt* circuit; *Worker* being made the superintending preacher of the circuit. It appears that, at the meeting in the previous year, namely 1849, the Conference had done certain acts which gave great offence to a considerable portion of the Wesleyan body, and caused a schism amongst them; and the Information and Bill alleges that the great majority of the trustees of the new chapel at *Holt*, and both the surviving trustees of the old chapel, have taken part with that portion of the Wesleyan body which is dissatisfied with the Conference, and who are now designated by the title of the Wesleyan Reformers; and that, in order to advance their views in opposition to those of the Conference, they have formed a scheme for wresting, from the preachers appointed by the Conference, both the old and the new chapel, and devoting

them to other ministers nominated by themselves. The Information alleges that this scheme so formed, was general, extending not only to the two chapels at *Holt*, but to all other Wesleyan chapels where the congregation was dissatisfied with the proceedings of the Conference.

1851.
ATT.-GEN.
v.
HARDY.

I should have stated that, since the erection of the new chapel, the old chapel has still been retained for the purpose of being occasionally used for religious services on week days; and also it has been used as a school room; and a small income of about 5*l. per annum*, has been derived by allowing it to be used, at times, by schools of other societies not forming part of the Wesleyan connexion. The two sole surviving trustees of the old chapel (being the Defendants *Johnson* and *Curteis*) are also trustees of the new chapel; and the trustees of the latter have also acted, so far as anything was to be done, as trustees of the former. Indeed, the only duty to be performed as to the old chapel, was to see that it was kept in proper repair, and was used only for the purposes of the preachers and the schools, and to receive the small annual sum paid for the occasional use of it by the other schools.

The Defendant, *William Hardy Cozens Hardy*, has, for a long time, been the principal acting trustee and treasurer; and, in that character, has had the receipt and expenditure of the funds; and he has taken part, warmly, with the seceding body of the Wesleyan Reformers. The plan for carrying into execution the object of ejecting the Conference ministers, is stated to have been suggested by *Hardy*, and is this:—Most of the Wesleyan chapels, like those at *Holt*, are subject to heavy debts, secured, in general, by mortgages of the

1851.
ATT.-GEN.
v.
HARDY.

chapels. Mr. *Hardy*, in a letter inserted in the *Wesleyan Times* (a paper friendly to the party calling itself the Wesleyan Reformers) in February 1850, suggested that, if the mortgagees would enforce their claims, they might, in general, obtain possession of the chapels by a title independent of that of the trustees; and then they might put in their own preachers, without reference to the authority of the Conference. In pursuance of this scheme, *Hardy*, in the month of May 1850, applied to *Curteis*, one of the two surviving trustees of the old chapel, and claimed payment of the 200*l.* remaining due to him on the mortgage of the 7th November 1821. The money was not forthcoming, and, on Saturday the 8th of June 1850, an advertisement appeared in the *Norfolk News*, announcing that the old chapel would be sold by auction, at *Holt*, on the Friday next following, that is, Friday the 14th. On that day it was accordingly put up for sale and sold to the Defendant *Turner* for 200*l.* *Turner* has since paid that sum to the Defendant *Hardy*, in discharge of the mortgage; and the old chapel has since been conveyed to him by *Hardy*, as mortgagee, and by *Curteis* and *Johnson*, as the two surviving trustees in whom the legal fee in the old chapel was vested under the deed of the 1st of July 1814. All the parties to this transaction, that is, *Hardy*, *Curteis*, *Johnson* and *Turner*, are trustees of the new chapel, and are Defendants to this suit; and they all take part with the Wesleyan Reformers. Since the conveyance of the old chapel to *Turner*, it has been used, with the sanction of *Hardy* and the majority of his co-trustees, for the purposes of the rival ministers preaching in opposition to and in defiance of the Conference, and in a mode wholly at variance with the trusts of the deed of the 1st of July 1814.

With respect to the new chapel, the facts alleged in the Information, are that, in the month of September last, the Defendant, *Hardy*, demanded payment of the money, 600*l.* secured to him by the mortgage term vested in *Colman*; and, default having been made in payment, he, afterwards, procured the Defendant, *Hill*, to pay off the mortgage and to take a transfer of it to himself: and *Hill*, in the beginning of the present year, brought an action of ejectment to recover possession of the new chapel.

1851.
ATT.-GEN.
v.
HARD

In this state of circumstances, the present Information and Bill was filed on the 18th February in the present year; and the object of the prayer is that the right of the Plaintiffs, *Worker* and *Badcock*, to the use of the two chapels, may be established; and, for this purpose, it prays, amongst other things, &c. &c. (a). A motion was made, before me, in the language of this part of the prayer, and was fully argued at the beginning of the present term. I have since fully considered the subject, and am now prepared to give my judgment.

With respect to the old chapel, the argument on behalf of the Relators, was that *Turner*, the purchaser, bought with full notice of the title of the vendors and of the trusts on which the property was held by them; that the deed of the 1st of July 1814, did not, under the circumstances, authorize a sale at all; for, though the trustees of that deed had power to sell for the purpose of raising money to enable them to purchase a larger chapel, yet that, when such larger chapel had been already obtained from other resources, the trustees had no longer the power, after the lapse of many years, to

(a) See notice of motion, *ante*, pages 338, 339 and 340.

1851.
ATT.-GEN.
v.
HARDY.

sell, when the object for which the sale had been authorized, had, already, been accomplished by other means. It was further argued that, even if there was a power to sell, yet the sale to *Turner* could not be sustained, the same having been made on an unreasonably short notice, and under circumstances which showed that it was not made *bonâ fide*, for the purpose of obtaining the best price in the market. I do not, in the view in which I take of this case, feel myself called on to express any opinion as to the validity of this sale; because, whether it was or was not valid, certainly the transaction gave, to *Turner*, all the title which had previously been vested in *Hardy* as mortgagee. At the time of the sale, he had, in himself, the legal title to a term of 1000 years in the old chapel, by way of security for the sum of 200*l*. *Turner*, on the sale, paid that sum to him; and he concurred in the conveyance to *Turner*; so that, whatever rights were possessed by *Hardy* prior to the sale, were, effectually, transferred to *Turner*; and I am of opinion that *Hardy*, as mortgagee, had a right to assert a title adverse to the trust; and that he or any one claiming under him by virtue of that title, had the right to use the chapel for any purpose he might think fit, without being at all bound by the trusts of the deed of 1814. The Defendant, *Hardy*, it must be observed, is not nor ever was a trustee of the old chapel. But it was contended that the trustees of the new chapel so mixed themselves up with the trusts of the old chapel, as to have taken on themselves the character of trustees of both. Supposing this to be so, still the trusts affect the equity of redemption only. For, when the deed of the 1st of July 1814 creating the trusts, gave power to raise money by mortgage, it, of necessity, gave power to create a title paramount to that of the trustees; and, as incident to that title, the right to use the chapel in any way, whether

in conformity or in opposition to the trusts of the deed. The power of mortgaging was, in fact, exercised by demising, for a term of years, to a trustee for *William Hardy* deceased, by whom the chief part of the funds for establishing the first chapel, were provided: and his title to the money as well as the legal title to the land, became, afterwards, vested in the Defendant, *Hardy*. It was contended that, whatever might have been the case of a mortgagee who was a stranger to the trusts, yet that *William Hardy* deceased, who was the most active trustee of the old chapel, could not, in the character of mortgagee, act in a manner not conformable to his duty as trustee. I do not feel the force of this argument. It was necessary to raise money, by mortgage, for the purposes of the trust; and, that the money should be advanced by one of the trustees, was natural and quite proper. It may be that, in taking the account of what is due to him on his security, the parties interested in the trust of the deed, may not be bound by the statement of the sum said to be advanced. In taking the account, there may be various equities arising out of the character of *Hardy* as trustee, or as representing *William Hardy* deceased, the original mortgagee, which would not attach on a mere stranger. But this goes only to the question of the amount due, and not to the right of insisting on the character of mortgagee. In truth, it is not suggested that the whole 200*l.* is not due; and, on the contrary, it seems probable that, but for the voluntary abandonment, by *William Hardy*, of a great part of his demand, a much larger sum would be due to those who are now clothed with his rights. But, be that as it may, the Defendant *Hardy*, as representing *William Hardy* deceased, had a right to insist on his title as mortgagee until the full amount due to him, whether it were more or less than 200*l.*, was duly paid; and,

1851.
 ATT.-GEN.
 v.
 HARDY.

1851.
ATT.-GEN.
v.
HARDY.

that right having been transferred to *Turner*, the Relators and Plaintiffs, as claiming title under the trusts of the equity of redemption, cannot obtain any relief except on the ordinary terms of redeeming the mortgage.

It is proper that I should advert to a case referred to, but not much relied on by the *Solicitor-General*; namely, *The Attorney-General v. Monro*, reported in 9th Jurist, 461. That was an Information seeking to restrain the trustees of a Scotch Presbyterian meeting-house at *Manchester*, from permitting it to be used for any purposes not warranted by the trusts of their deed of settlement. A motion was made to restrain them accordingly. The trustees resisted the motion on the ground, among other things, of certain adverse titles existing in third parties and transferred to the Defendants, the trustees, or some of them; and, under this alleged title paramount, they sought to act in a manner not warranted by the trust. *Vice-Chancellor Knight Bruce* would not listen to this defence; but the ground on which he went, was that the parties entitled, if they were entitled to an adverse interest, had so conducted themselves as to lead those, who were expending money in building the chapel, to suppose that no such adverse title existed, or would ever be enforced against the trustees. Every one must, at once, assent to the justice of that decision, and the soundness of the principle on which it rested. But the facts before me, are such as to make the principle on which that case proceeded, wholly inapplicable. So far from there having been any conduct, here, on the part of the mortgagee, leading to the inference that he did not mean to insist on the mortgage, it is part of the case made by the Plaintiffs, that interest was regularly paid, every half-year, up to the time of the conveyance to *Turner*.

No other authority was cited on this part of the case; and the conclusion at which I have arrived, is that the Defendant, *Hardy*, had a right to set up his title as mortgagee; and that, whatever right he had, is now vested in *Turner*; and so that I have no right to give any relief against him except on a bill to redeem and offering to pay what is due. Whether, on such a bill, the Plaintiffs would be entitled to relief, must depend on the question whether the sale was a valid sale according to the trusts of the deed of the 1st of July 1814. If the sale was valid, then, under no circumstances, can the Plaintiffs have the relief they are seeking. If it was invalid, then they may get relief on a bill offering to redeem; but not otherwise. In this suit, there is no such offer; and so it is not important to inquire whether the sale was or was not valid.

This disposes of the relief sought by the motion, so far as regards the old chapel. The same principles, precisely, must govern my decision as to the new chapel. The Defendant, *Hardy*, had a right to assign over his mortgage to *Hill*. There was something like an attempt to mislead the Plaintiffs, in the representations made to them, at the latter part of the last year, relative to the transfer to *Hill*; at all events, something like mystery in a transaction where nothing ought to have been concealed or misrepresented. In fact, however, the mortgage was, eventually, transferred to *Hill*: and, on the grounds which I have already explained as the foundation of my judgment relative to the old chapel, I think that *Hill* had a perfect right to assert his title as mortgagee, and to bring an ejectment to obtain possession. I do not shrink from going the full length of saying that I think *Hardy* himself and his trustee, might have done so, and, therefore, of course, *Hill* may do the same.

1851.
ATT.-GEN.
v.
HARDY.

1851.

ATT.-GÉN.

v.

HARDY.

In order to stop execution on the ejectment, I understand that the 600*l.* was brought into Court, on an arrangement that it should be dealt with as I might think right, and as if *Hill* had regularly moved to have the money paid out to him. If there had been no such arrangement, I could have done nothing but refuse any injunction restraining *Hill* from taking possession: and, therefore, all I can now do, is to order that possession be given to him, unless the Plaintiffs agree that the 600*l.* shall be paid out to him. If this is done, *Hill* may be dismissed from the Cause; and, of course, in taking the account against *Hardy*, he will be chargeable with all the sums come to his hands as trustee, and which he ought to have applied towards liquidation of the mortgage. If the Plaintiffs prefer it, they may still retain *Hill* as a Defendant, and then he, as well as *Hardy*, will be responsible for any portion of the 600*l.*, which, on taking the whole of the accounts, *Hardy* could not have claimed against those by whom he may be redeemed.

The only other relief asked by the motion, is that the Defendant, *Hardy*, and the other Defendants, the trustees of the new chapel who acted in concert with him, may be restrained from further acting as trustees in carrying into execution the trusts of the deed of October 1837. This is asked, as to the Defendants *Hardy* and *Colman* on the ground that they have been duly expelled from the society of Methodists, and so that, either by the express stipulation of the model deed, or, if those provisions are inapplicable, then on general principles of expediency, they are incapacitated from any longer executing trusts for the benefit of a religious community with which they have no connexion, and so may fairly be supposed to have no sympathy. And, further, as to all these Defendants, it was argued that their conduct in encouraging and assisting the

scheme for putting the chapel into the hands of mortgagees, and so defeating the objects of the deed of which they were trustees, is, of itself, sufficient to show their unfitness for the discharge of duties which it has thus been their object to thwart; and, in fact, that they must be considered as having voluntarily withdrawn from the society. With respect to the argument derived from the expulsion of *Hardy* and *Colman*, I think it is a sufficient answer to say that they dispute the validity of the acts by which they were expelled; and, on looking at the rules of the society, I confess it seems to me doubtful, at least, whether they are not right. At all events, neither on this ground nor on the more general ground of unfitness applicable to all the trustees who take part with *Hardy*, is there any such urgency as to warrant me in interposing, by a summary remedy, before the Cause is brought to a hearing. The only conduct complained of as an alleged breach of trust, is the fact of the trustees having, more or less, assisted *Hardy* and *Hill* in enforcing their mortgage. That question being disposed of, I do not find any other breach of trust, suggested as likely to occur, rendering summary interference necessary: and, therefore, though, at the hearing, it may, as I have already stated, be very expedient to appoint new trustees in the place of persons whose conduct, though not, as I think, amounting to a breach of trust, clearly indicates a total want of sympathy with the feelings and interests of those of whose rights they are the guardians, yet I do not see any ground warranting me in interfering on motion.

The result is that I shall dismiss this motion; but, under all the circumstances, I shall make no order as to the costs of it.

1851.
 ATT.-GEN.
 v.
 HARDY.

1851.

ATT.-GEN.

v.

HARDY.

My view of the case has rendered it unnecessary for me to consider the question, whether this record is so framed as to entitle the Plaintiffs to sue at all; and, therefore, as to that part of the argument, I desire to be considered as not having expressed any opinion at all.

1851:

19th February

and

19th March.

Power.

Trust.

Precatory trust.

Family.

Will.

Construction.

WILLIAMS v. WILLIAMS.

THE Plaintiff was the eldest son, and the Defendants *Charles and Diana Hamlyn Williams* were the only other surviving children of *Sir James Williams*, late of *Clovelly Court* in the county of *Carmarthen*, Bart. by *Diana* his wife, both deceased: the Defendant *Clissold* was the personal representative of *Lady Williams*. The bill stated that *Sir James* made his will dated the 21st March 1826, and thereby, after devising the freehold hereditaments therein described in manner therein mentioned, gave and bequeathed all rents and arrears of rent which should be due or owing to him, at the time of his decease, from all, every or any of the tenants of his estates therein mentioned and of his other estates in *Devonshire* and *Carmarthenshire*, together with the lease of his house in *Upper Grosvenor Street* in the

Testator, by his will, gave personal property to his wife, absolutely, for her own use and benefit. By a codicil, which was in the form of a letter to his wife, he said:

"It is my wish that you should enjoy everything in my power to give, using your judgment as to where to dispose of it amongst your children when you can no longer enjoy it yourself: but I should be unhappy if I thought it possible that any one not of your family, should be the better for what, I feel confident, you will so well direct the disposal of."

Held that the word, 'family,' was not confined to children, but included descendants in every degree; and that the wife was entitled to the property, absolutely, and not merely for her life with a power in the nature of a trust for her children.

county of *Middlesex*, and all the furniture therein, and also all money which, at the time of his decease, should be found in any of his houses, and all money which should be at his bankers', also all and every sum and sums of money which should be then invested in his name, or in the names of others in trust for him, in all, every and any of the public funds, and also all his horses not being used for husbandry, carriages, musical instruments, pictures, drawings, prints, plate, linen, china, diamonds, trinkets, watches and other ornaments in any of his houses in town or country, unto his wife, Dame *Diana Williams*, absolutely, for her own use and benefit: and the said testator thereby directed his trustees, immediately after his decease or as soon after as they conveniently could, to sell and dispose of all and every the live and dead stock and all other farming utensils and implements of husbandry which might be used in any of his farms holden by him, both in *Devonshire* and *Carmarthenshire*, at the time of his death, at or for the best price or prices which could be obtained for the same; and he directed the produce of such sale to be, immediately or as soon as could be thereafter, paid unto and divided equally between his sons, *Charles Williams*, and *Orlando Williams*: and, after giving certain pecuniary legacies to the persons in his will named, the testator appointed his wife, Dame *Diana Williams*, jointly with *John Webb* and *Zachary Hammett Drake*, executrix and executors of that his will, and requested that his wife would act as guardian to his eldest daughter, *Diana Hamlyn Williams*, and make such provision for her and in such way as she, his said wife, might think advisable.

The bill next stated that the testator made a codicil to his will, which codicil was dated the 23rd day of Au-

1851.
 WILLIAMS
 v.
 WILLIAMS.

1851.
 WILLIAMS
 v.
 WILLIAMS.

gust 1829, and was in the words and figures following.—
 “*Clovelly Court*, August 23rd 1829—My dear *Dy*: A stamp for 8s. 6d. is not to be had in these parts. I shall therefore, feel obliged to you to give *Charlotte*, with my kindest love, the sum that stamp would cover, namely, 1000*l*. It will be a nice little nest egg for her; and you will find plenty at the bankers’ after having so done. Independent of money at the bankers’, where I always like a good balance, there are large arrears due from tenants: and *I hope my will is so worded that everything that is not in strict settlement you will find at your command. It is my wish that you should enjoy everything in my power to give, using your judgment as to where to dispose of it amongst your children when you can no longer enjoy it yourself: but I should be unhappy if I thought it possible that any one not of your family, should be the better for what, I feel confident, you will so well direct the disposal of.* May Heaven bless and protect you. Most affectionately yours, JAMES WILLIAMS.—I direct this to *Charlotte*, from whose hands you will receive it.” The bill next stated that, by the words, “My dear *Dy*,” used in the codicil, the testator meant and intended his late wife Dame *Diana Williams*; and that, by the name, ‘*Charlotte*’ used in the codicil, the testator meant and intended his daughter, Dame *Charlotte Chichester*, late the wife of Sir *Arthur Chichester*, Bart., both of whom were since dead: that the following words were indorsed, by the testator, upon the codicil (that is to say): “Lady *Chichester*, to be read by her and then given to her mother by her:” that the codicil was, in fact, sent by the testator to Dame *Charlotte Chichester*, and was duly delivered by her to the said Dame *Diana Williams*. The bill further stated that the testator died on 3rd December 1829; and that his will and codicil were duly proved by

his executrix and executors: that, under and by virtue of the codicil, *Dame Diana Williams became entitled to all the personal estate and effects of the testator, for her life, with a power of appointing the same to such of her children, living at the time of her death, as she should think proper; and that, in default of and subject to any such appointment, the said personal estate vested, absolutely, in the children of Dame Diana Williams living at the time of her death*: that she, notwithstanding the codicil, appropriated to her own use the whole of the personal estate and effects of the testator, and that she sold large portions of the personal estate, and converted the proceeds thereof to her own use. The bill further stated that *Webb and Drake* died in the lifetime of *Dame Diana Williams*: that she died in September 1849, having made her will and appointed the Defendant, *Clissold*, the executor thereof: that she left three children only her surviving, that is to say, the Plaintiff, and the Defendants *Charles Williams* and *Diana Hamlyn Williams*: that she made no appointment, either during her life or by her will, of the personal estate and effects bequeathed to her, *for her life*, by the codicil to the will of the testator; and, *consequently, the Plaintiff, upon her death, became absolutely entitled to one-third part of such personal estate and effects, as one of her three children who were living at her death*: but that the Defendant, *Charles Williams*, alleged that, under the codicil, *Dame D. Williams* became absolutely entitled to the residuary personal estate of the testator. The bill prayed, amongst other things, that it might be declared that, in the events that happened, the Plaintiff became, under and by virtue of the codicil to the will of the testator, absolutely entitled to one-third part of his residuary personal estate and effects.

1851.

WILLIAMS

v.

WILLIAMS.

The Defendant, *Charles Williams*, put in a general demurrer.

Mr. *Rolt* and Mr. *Glasse*, in support of the demurrer, said that there could be no doubt that *Lady Williams* took an absolute interest, under the will, in the property thereby bequeathed to her; and that the only question was whether the words in the codicil: "It is my wish that you should enjoy every thing in my power to give, using your judgment as to where to dispose of it amongst your children when you can no longer enjoy it yourself: but I should be unhappy if I thought it possible that any one not of your family, should be the better for what, I feel confident, you will so well direct the disposal of," cut down that interest to a life-interest, and imposed an obligation, on *Lady Williams*, to dispose of the property, at her death, amongst her children: that the testator, immediately before he used those words, said he hoped his will was so worded that *Lady Williams* would find every thing that was not in strict settlement, *at her command*; which showed that he intended the property to remain at her disposal; that, in the next sentence, the testator did not give any direction or recommendation, or express any wish or desire that *Lady Williams* should, at her death, dispose of the property amongst her children; but assumed that, in the natural course of things, she would so dispose of it, and expressed a wish to this extent only—that, if she did the act which she probably would do of her own free will, she would use her judgment in doing it; and, consequently, that *Lady Williams* held the property, at her death, unfettered with any trust either express or implied: *Harland v. Trigg*(a),

(a) 1 Bro. C. C. 142.

Sale v. Moore (b), Meredith v. Heneage (c), Lechmere v. Lavie (d), Knight v. Knight (e), Curtis v. Rippon (f), and Winch v. Brutton (g).

1851.
WILLIAMS
v.
WILLIAMS.

Mr. *Bethell*, Mr. *Malins* and Mr. *Karslake*, in support of the bill, said that the words: "using your judgment as to where to dispose of it amongst your children when you can no longer enjoy it yourself," imposed a condition or obligation, on Lady *Williams*, to dispose of the whole of the property that the testator had given her, when she could no longer enjoy it herself, that is to say, at her death, amongst her children; that a gift of 100*l.* to *A.*, he paying *B.* 40*l.*, was not a gift to *A.*, *simpliciter*, but was a gift to him with a condition annexed that he should pay *B.* 40*l.*: 1 *Sheppard's Touchst.*, *Preston's* edit., 123: that the word, 'family' in the next sentence, was clearly equivalent to, 'children;' and that sentence was expressive of the testator's confidence that Lady *Williams*, in exercising the power with which he had intrusted her, would be influenced by considerations of prudence and affection.

The *Vice-Chancellor*.—The expression is: "your family." Had Lady *Williams* any children by a former husband?

Argument resumed.—She had no children by any one but Sir *James*, and she was of an advanced age at the date of the codicil. We will now make a few observations upon the cases cited. In *Harland v. Trigg*, there

(b) 1 Sim. 534.

(c) *Ibid.* 542.

(d) 2 Myl. & Keen, 197.

(e) 3 Beav. 148, and 11

Cl. & Fin. 513, *nom. Knight v. Boughton*.

(f) 5 Madd. 434.

(g) 14 Sim. 379.

1851.

WILLIAMS

v.

WILLIAMS.

was an element of uncertainty in the word, 'family:' and, when the objects of the alleged trust are uncertain, no trust can be deemed to have been effectually created. In *Curtis v. Rippon* the words relied on as creating a trust, were nothing more than words of exhortation to the legatee, and words expressive of personal confidence in the moral and religious principles of the legatee. *Knight v. Knight* was a case of the same description. There was nothing in the will, in that case, expressive of anything like legal obligation. Nothing more could be implied from it, than that the testator had confidence in certain moral principles of action, namely, the liberality and justice of the persons named (j). In *Sale v. Moore*, the testator recommended his wife to consider his near relations, if she survived him, as he should consider them himself, if he survived her. There, the objects to be considered, and the manner in which they were to be considered, were, both of them, uncertain. In *Meredith v. Heneage*, the testator said that he had given his property, to his wife, *unfettered and unlimited*: and no words that he could have used, could have more clearly indicated his intention that, whatever might be the legal effect of his language, he did not mean to limit or restrict, in the slightest degree, his wife's ownership of the property. Besides, he directed her to distinguish the heirs of the testator's late father, by devising and bequeathing the whole of his property, together and entire, *to such of them as she might think best deserved her preference*. In that case, therefore, there were not only the words, 'unfettered and unlimited,' but the direction (if it may be so called) that followed those words, was so uncertain and inconsistent with itself, that it was impossible for a Court of Equity to carry it into

(j) See Lord Cottenham's judgment, 11 Cl. & Fin. 551.

effect. In *Lechmere v. Luvie*, the words were: "If they die single, of course they will leave *what they have*, amongst their brothers and sisters or their children." That was an expression of confidence in the personal qualities and rules of action of the legatees, and it had reference not only to the testatrix's property, but to all the other property that the legatees might possess at their deaths. In *Winch v. Brutton*, the testator gave his property to his wife, for *her own absolute use, benefit and disposal*, and added that he had given her *the absolute dominion* over the whole of it; and he expressed nothing more than his confidence that she would perform a moral obligation in disposing of it. These are all the authorities that were cited; and we submit that not one of them approximates to the case now under consideration. Besides, this is not a case in which the Court is called upon to attach a trust upon a person who takes property absolutely; but it is a case in which the legatee's enjoyment of the property is limited to her life, and, at her death, she is to give it to one or more of her children. In such a case, if the legatee does not exercise the power of selection and distribution, the Court steps in and says there is an implied gift; equality is equity, and, as the donee of the power has not exercised it, all the objects of the power shall share the property equally.

1851.
 WILLIAMS
 v.
 WILLIAMS.

The following cases were cited for the Plaintiff: *Cary v. Cary* (k), *Malim v. Keighley* (l), *Wright v. Athyns* (m), *Harding v. Glyn* (n), *Brown v. Higgs* (o), *Raikes v.*

(k) 2 Scho. & Lef. 173.

(n) 1 Atk. 469.

(l) 2 Ves., jun., 333.

(o) 4 Ves. 708; and 5 Ves.

(m) Turn. & Russ. 143; 495.

see 157.

1851.

WILLIAMS

v.

WILLIAMS.

Ward (p), *Pierson v. Garnet* (q), *Eade v. Eade* (r), *Wood v. Cox* (s), *Walsh v. Wallinger* (t).

In the course of the argument in support of the bill, Mr. *Rolt* cited *Johnston v. Rowlands* (u),

Mr. *Bethell* said that that case was governed by the same principle as *Meredith v. Heneage*.

Mr. *Rolt* in reply.

The argument for the Plaintiff, has proceeded, entirely, upon the codicil, without regard to the will; and it has been said that Lady *Williams* was only tenant for life, with a power in the nature of a trust for her children. The will, however, contains an absolute gift to Lady *Williams*; and it is evident, from the codicil, that the testator did not mean to cut down that gift to a gift for life. He says: "I hope my will is so worded that every thing that is not in strict settlement, you will find *at your command*." Therefore, he refers to his will and confirms the absolute gift in it. He then says that it is his wish that his wife should enjoy every thing in his power to give; that is, the *corpus* of the property: and, in the previous part of the codicil, he desires his wife to give 1000*l.* to one of his daughters. That is a gift out of the *corpus*, which he had given her by his will: and, to that extent, and to that extent only, the gift in the will is altered. Then he tells his wife that she will find plenty at the bankers', after she has paid the 1000*l.*; and that, independent of money at the bankers', where he

(p) 1 Hare, 445.

(q) 2 Bro. C. C. 38.

(r) 5 Madd. 118.

(s) 2 Myl. & Cr. 684.

(t) 2 Russ. & Myl. 78.

(u) 2 De G. & Smale, 356.

always liked a good balance, there were large arrears due from tenants. Is that language which the testator would have addressed to his wife, if he had meant her to be only tenant for life of the property? Surely he would not have directed her to pay the 1000*l.*, to her daughter, and have told her that, after she had done so, she would find plenty at the bankers', if he had not meant her to be absolute legatee of the property: and the subsequent language as to the enjoyment of the property, is quite consistent with that intention. In *Raikes v. Ward* and *Cary v. Cary*, the gifts were made on condition, or, to use the words of *Sheppard's Touchstone*, *câ intentione*.

The decision in *Malim v. Keighley*, is a very questionable one; but, there, the word 'recommend' was used. It was said that the words in this case: "using your judgment as to where to dispose of it amongst your children," create a condition; and I admit that they would have had that effect, if they had been preceded by a direction to dispose of the property amongst the children; but there is no such direction. The testator does not say: "disposing of it amongst your children, and using your best judgment in so disposing of it." He *assumes* that she will dispose of the property amongst her children, and that she will use her judgment in doing so. Moreover, if any one of the children had died, before *Lady Williams*, leaving issue, she, according to the argument for the Plaintiff, could not have given any part of the property to the issue of that child; but, according to the construction that I contend for, she would have had the means of providing for the issue.

Mr. *Rolt* then referred to the following passage in Lord *Cottenham's* judgment in *Knight v. Boughton*: "In ordinary cases, the testator must be supposed either to have considered his recommendation as equivalent to

1851.
 WILLIAMS
 v.
 WILLIAMS.

1851.
 WILLIAMS
 v.
 WILLIAMS.

a command, or as imposing a condition upon the gift ; both of which exclude the idea of discretion, which, in the present case, is necessarily implied " (v) . He concluded by reading the following passage from the judgment of the Lord Chief Baron in *Meredith v. Heneage* : " In considering these cases, it has always occurred to me that, if I had made such a will as has been generally considered imperative, I should never have intended it to be imperative ; but, on the contrary, a mere intimation of my wish that the person to whom I had given my property, should, if he pleased, prefer those whom I proposed to him, and who, next to him, were, at the time, the principal objects of my regard " (x) .

The VICE-CHANCELLOR :

The real question in these cases, always is whether the wish or desire or recommendation that is expressed by the testator, is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party ; leaving it, however, to the party, to exercise his own discretion. That is the real question. I must look into the authorities before I decide this case ; but I will now observe that *Harding v. Glyn* does not seem to me to apply. In that case there was clearly a power ; but, here, the question is : Is there any power ? Is there anything more than a request ? That question arises prior to the question in *Harding v. Glyn*. If there is a power, the Counsel in support of the demurrer, do not, as I understand, dispute that there is an implied gift or trust for the children.

The VICE-CHANCELLOR :

The question in this case, is whether, under the bequests in the will and codicil of the late Sir *James Williams*, his widow, Lady *Williams*, took an absolute interest in the personal property given to her, or only an estate for life, with remainder to her children as she should appoint : and this depends on the question whether the words of the codicil ; “using your judgment where to dispose of it amongst your children when you can no longer enjoy it yourself,” are imperative, or only, in the language of the law, precatory. On this subject there has been a long series of authorities in modern times, ending with the case of *Knight v. Boughton* in the House of Lords. The point really to be decided in all these cases, is whether, looking at the whole context of the will, the testator has meant to impose an obligation, on his legatee, to carry his express wishes into effect, or whether, having expressed his wishes, he has meant to leave it to the legatee to act on them or not at his discretion. In some of the cases, it has been said that the points to be inquired into, are, first, whether the subject-matter to which the precatory words apply, is clear ; and, secondly, whether the favoured objects are distinctly ascertained ; and, when these two requisites concur, that is, when there is no doubt as to the property to which, or the persons to whom the precatory words refer, there, it would seem to have been sometimes assumed that such words are as obligatory as words creating an express trust. I confess that this reasoning has never carried conviction to my mind. I doubt if there can exist any formula for bringing, to a direct test, the question whether words of request or hope or recommendation, are or are not to be construed as obligatory. It may be very safe, in general, to say that, when there is uncertainty as to

1851.

WILLIAMS

v.

WILLIAMS.

19th March.

1851.

WILLIAMS
v.
WILLIAMS.

the subject-matter, or as to the objects in whose favour the request or hope or recommendation is expressed, there, precatory words cannot have been intended to be absolutely binding. But the converse of the proposition is by no means equally true. The subject-matter of the bequest and the objects of the testator's bounty, may be perfectly ascertained; and yet the context may show that words of hope or request or recommendation, were not intended to interfere with the absolute discretion of the legatee.

I have made these observations with reference to some of the arguments addressed to me and to which I was referred as being to be found in many of the cases, rather than because they are absolutely necessary to the present decision. For I am of opinion that, in this case, there is a want of certainty as to the objects to whom the precatory words refer: and I am also of opinion, mainly on the ground of such uncertainty, that, looking at the whole of the will and codicil together, the testator meant to give, to his wife, an absolute discretion over the property bequeathed to her.

There can be no doubt but that, if the matter had rested on the words of the will, the widow's interest would have been absolute. The gift is to her, absolutely, for her own use and benefit. Then comes the codicil [his Lordship read it]. The argument for the Plaintiff is that the words: "using your judgment as to where to dispose of it amongst your children when you can no longer enjoy it yourself," cut down the preceding absolute gift, and reduce the interest of the legatee to a life estate with a power to dispose of the whole among her children when she can no longer enjoy it herself, that is, at her death. I assume, for the purpose of

argument, that this would have been a legitimate construction of the words if the testator had stopped at the words : "when you can no longer enjoy it yourself." The testator, however, does not stop there : he goes on to say : "But I should be unhappy if I thought it possible that any one not of your family should be the better for what, I feel confident, you will so well direct the disposal of." I think it may, fairly, be inferred, from the last passage, that the testator meant to say he would not be unhappy to think that any one of his wife's family should take any part of the property bequeathed which she might think fit to give him. In other words, the testator did not consider that he had said anything which would prevent his wife from giving, any part of the property bequeathed, to any member of her family. Now *Lady Williams*, at the death of the testator, had, at least, four children. One of them, *Lady Chichester*, was married, and, of course, adult ; and she was younger than her sister. What were the ages of the sons, does not appear. In this state of things I think that the word, "family," as used in the codicil, is not confined to children only ; but would include descendants in every degree. The word, "family," is one of doubtful import, and may, according to the context, mean children, or heir, or next-of-kin. But here, I think, the words, "of your family," are equivalent to, "of your blood," that is, "your posterity, your descendants." And the testator must be considered to have said he was happy in thinking of the mode in which his property would, eventually, go ; for that he felt confident his wife would give it to no one who was not one of her descendants. I think it is a perfectly legitimate inference, from this, that he considered the language he had used to be such as would authorize his wife to give it to any of her descendants, that is, to a class more extensive than

1851.

WILLIAMS

v.

WILLIAMS.

1851.

WILLIAMS

v.

WILLIAMS.

children. How is this to be made consistent with the language he has used? It can only be either by saying that the word, "children," means, "descendants," or by holding that the wife took an absolute interest; an interest, therefore, which would enable her to give to any one, with a confident expression of belief, on the part of the testator, that she would not exercise her discretion in favour of any one not a descendant, and which confidence left him perfectly happy with respect to the future enjoyment of his property. And I think this latter construction is the true one: for, to hold that the word, "children," means, "descendants," would be to put on it a very forced interpretation, and one which would lead to the inconvenient result that all descendants, in whatever degree, must have something. For the power, if it be a power, is one of distribution, not of selection: and so, if the widow should die, without exercising the power, leaving children, grandchildren and great grandchildren, they would all take as a class, *per capita*. It is impossible to imagine that this was ever contemplated by the testator; and so, the only other construction must prevail, namely, that which would enable the wife to give to any descendant by virtue of an absolute interest vested in her by her husband. This construction is conformable to the current of modern decisions, and to what has been felt, in latter times, to have been ordinarily the real meaning of testators: and if, in any case, such an inference may legitimately be drawn from the surrounding circumstances, it would be in this, where the words supposed to reduce the absolute interest to a mere life estate, are to be found, not in the original document whereby the property was bequeathed, but in a subsequent codicil of so informal a character that, in all probability, it would have been matter of great surprise to the testator, if

he had been told it would be treated as a codicil at all. I do not, however, rest on this ground. My judgment is founded on the consideration that, if I were to construe the words of the codicil as reducing the wife's interest to anything short of an absolute interest, it could only be by holding that they cut it down to a life interest with a power of distribution among her children. But I think that this cannot be; for, by the same codicil, the testator shows a clear intention that the wife might, in her discretion, give to remoter descendants; and this latter intention can be effectuated only by supposing that all his expressions narrowing the wife's absolute interest, were intended, merely, as an expression of the testator's wishes, without meaning to make them obligatory. The result is that the demurrer must be allowed.

1851.
 WILLIAMS
 v.
 WILLIAMS.

THE SOUTH STAFFORDSHIRE RAILWAY
 COMPANY v. HALL.

THIS was a motion to dissolve an *ex parte* injunction, by which the Defendants were restrained from taking any steps under a notice, which they had served upon the Plaintiffs, claiming compensation for damage alleged to be done to a farm in their occupation, in consequence of the railway crossing, on a level, a road leading to the

1851.
 24th, 25th and
 26th February,
 and
 22nd March.
 Injunction.
 Lands Clauses
 Act.
 Railway Clauses
 Act.

Held, notwithstanding the decision in *The London and North Western Railway Company v. Smith*, that a person who has served a Railway Company with notice, under the 68th sect. of the Lands Clauses Act, claiming compensation on the ground that his land has been injuriously affected by the execution of the Company's works, ought not to be restrained from proceeding pursuant to his notice.

1851.

SOUTH STAFF-
FORDSHIRE
RAILWAY
COMPANY

v.

HALL.

farm. The case resembled, very closely, *The North Western Railway Company v. Smith* (a); indeed, it was said, by the Counsel in support of the motion, that the bill was almost a transcript of the bill in that case.

The 68th sect. of the Lands Clauses Act, 8 & 9 Vict. c. 18, under which the notice was served, enacts: "That, if any party shall be entitled to any compensation in respect of any lands or of any interest therein, which shall have been taken for or *injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act or any Act incorporated therewith*, and, if the compensation claimed in such case, shall exceed the sum of 50*l.*, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and, if such party desire to have the same settled by arbitration, it shall be lawful to him to give notice in writing, to the promoters of the undertaking, of such his desire, stating, in such notice, the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement, for that purpose, within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or, if the party so entitled as aforesaid, desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing, of such his desire, to the promoters of the undertaking, stating such par-

(a) 1 Hall & Twells, 161; and 1 Macn. & Gord. 216.

ticulars as aforesaid ; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and, in default thereof, they shall be liable to pay, to the party so entitled as aforesaid, the amount of compensation so claimed, and the same may be recovered by him with costs, by action in any of the superior Courts."

1851.
SOUTH STAFFORDSHIRE
RAILWAY
COMPANY
v.
HALL.

The following sections of the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, also were referred to. Sect. 6: "In exercising the power given to the Company, by the special Act, to construct the railway and to take lands for that purpose, the Company shall be subject to the provisions and restrictions contained in this Act and in the Lands Clauses Consolidation Act ; and the Company shall make, to the owners and occupiers of, and all other parties interested in any lands taken or used for the purposes of the railway or *injuriously affected by the construction thereof*, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the Company ; and, except where otherwise provided by this or the special Act, the amount of such compensation shall be ascertained and determined in the manner provided by the said Lands Clauses Consolidation Act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof ; and all the provisions of the said last-mentioned Act, shall be

1851.
SOUTH STAFF-
ORDSHIRE
RAILWAY
COMPANY
v.
HALL.

applicable to determining the amount of any such compensation, and to enforcing the payment or other satisfaction thereof." Sect. 16. "Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the Company, for the purpose of constructing the railway, or the accommodation works connected therewith herein-after mentioned, to execute any of the following works; (that is to say,) they may make or construct, in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, railroads or tramroads, rivers, canals, brooks, streams, or other waters, within the lands described in the said plans or mentioned in the said books of reference or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings and fences as they think proper. They may alter the course of any rivers not navigable, brooks, streams, or watercourses, and of any branches of navigable rivers, such branches not being themselves navigable, within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages, or other works over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets or ways, or raise or sink the level of any such rivers or streams, roads, streets or ways, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper: They may make drains or conduits into, through, or under any lands adjoining the railway, for the purpose of conveying water from or to the railway: They may erect and construct such houses, warehouses, offices and other buildings, yards, stations, wharfs, engines, machinery, apparatus and other works and conveniences as

they think proper: They may, from time to time, alter, repair or discontinue the before-mentioned works or any of them, and substitute others in their stead; and they may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway: Provided always, that, in the exercise of the powers by this or the special Act granted, the Company shall do as little damage as can be, and shall make full satisfaction, in manner herein and in the special Act and any Act incorporated therewith provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers."

1851.
SOUTH STAFF-
ORDSHIRE
RAILWAY
COMPANY
v.
HALL.

Mr. *James Parker* and Mr. *Willcock*, in support of the motion.

The bill in this case is, almost, a transcript of the bill in *The London and North-Western Railway Company v. Smith*. Lord *Cottenham's* decision in that case, excited a good deal of attention in the profession, and has not been generally approved of. We rely on a case lately decided by the present Lord Chancellor, *The East and West India Docks and Birmingham Junction Railway Company v. Gattke(b)*. Every line of the judgment in that case, is applicable to our case: and we submit that that case and *The London and North-Western Railway Company v. Smith*, cannot stand together. There can be no doubt that the Defendants' farm is injuriously affected by the construction of the railway; and, therefore, we are entitled to call upon the Plaintiffs to issue their writ, to the sheriff, to summon a jury for settling the amount of

(b) Mr. *Parker* read, at full length, a transcript of the short-hand writer's notes of the judgment. A report of

the case has been since published. See 3 Macn. & Gord. 155.

1851.

SOUTH STAFF-
FORDSHIRE
RAILWAY
COMPANY
v.
HALL.

the compensation which the Defendants are entitled to. It will be said, perhaps, that they are not entitled to any compensation, because the damage which they complain of, was not done during the execution of the Plaintiffs' works: but we contend that the 68th clause of the Lands Clauses Act and the 6th clause of the Railways Clauses Act, *are not confined to damage done during the progress of the works, but extend to damage consequential on the completion of the works.* The road is an easement to the farm, and we say that the Plaintiffs have damaged it by the exercise of the powers conferred upon them by the 16th section of the Railways Clauses Act.

The East and West India Docks, &c. v. Gattke, was mainly relied on in support of the motion; but the following cases also were cited: *Cooling v. The Great Northern Railway Company (c)*, *Regina v. The Eastern Counties Railway Company (d)*, *Regina v. The Lancaster and Preston Railway Company (e)*, *Corrigal v. The London and Blackwall Railway Company (f)*, *Harman v. Jones (g)*.

Mr. *Bethell* and Mr. *Speed* in support of the injunction.—No two cases can be imagined more completely identical than this case and *The London and North-Western Railway Company v. Smith*, on which we rely.

Here the railway has been completed, and used, for some time, without complaint: and the owner of the right of way did not claim any compensation in respect of the obstruction of the road. The Defendants now say that their farm has been injuriously affected by the railway having been made across the road. Our answer

(c) 14 Jur. 128.

(f) 5 Mann. & Gr. 219.

(d) 2 Queen's Bench Rep. 347. (g) Cr. & Ph. 299.

(e) 6 Queen's Bench Rep. 659.

to them is that the Plaintiffs had authority, both under their special Act and the general Act, to do what they complain of: and, therefore, they cannot say that their land has been *injuriously* affected. A person or his property may sustain *damnum*; but cannot sustain *injuria* from a lawful act. The word, 'injuriously,' in the 68th section of the Lands Clauses Act and the 6th section of the Railways Clauses Act, designates cases in which Companies are doing what they are not legally authorized to do, or have taken or are using land without having given the required notices. What the Plaintiffs have done was not a wrongful, but a lawful act. Besides, the damage in respect of which the Defendants say they are entitled to compensation, is, at the utmost, consequential: and we contend that the sections of the Acts which they rely upon, provide only for damage done *in the execution of the works*. In *Cooling v. The Great Northern Railway Company*, the Defendants, by issuing their precept to the sheriff, admitted that it was a case for compensation. In *Regina v. The Eastern Counties Railway Company*, the judgment proceeded on the peculiar language of the Company's Act. In *Corrigal v. The London and Blackwall Railway Company*, the Defendants, by going before a jury, had admitted that the land had been injuriously affected. In *Gatthe's case*, the complaint was of damage *wantonly* inflicted by the Company in the execution of their works; and unnecessary or wanton damage, being unauthorized, is *injuria*. Consequently, that case leaves untouched the principle of Lord Cottenham's decision in *Smith's case*, on which we rely.

Mr. Speed referred to *Blakemore v. The Glamorganshire Canal Navigation (g)*, *Webb v. The Manchester*

1851.
SOUTH STAFFORDSHIRE
RAILWAY
COMPANY
v.
HALL.

1851.
 SOUTH STAFFORDSHIRE
 RAILWAY
 COMPANY
 v.
 HALL.

and *Leeds Railway Company* (h), *Frewin v. Lewis* (i), *Poynder v. The Great Northern Railway Company* (j), *The King v. The London Dock Company* (k), *The Sutton Harbour Company v. Hitchens* (l).

Mr. J. Parker, in his reply, cited *Thicknesse v. The Lancaster Canal Company* (m), and *Hutton v. The London and South-Western Railway Company* (n).

22nd March.

The VICE-CHANCELLOR :

This was a motion to dissolve an injunction which I granted, *ex parte*, on the 2nd of January last. The bill stated several Acts of Parliament, under which the Plaintiffs were incorporated; and that, under the powers thereby given to them, they proceeded to make their railway, and carried it, at right angles, across a road leading from the village of *Streetway* to a farm of the Defendants, called the *Hill Cottage Farm*. The bill then states that, on the 12th of December 1850, the Defendants caused a notice to be served, on the Plaintiffs, claiming, from them, under the 68th section of the Lands Clauses Act, a sum of 550*l.* by way of compensation for the damage occasioned, to their said farm, by reason of the railway crossing, on a level, the only road to it; and the Defendants called on the Company either to pay the sum of 550*l.* which they so claimed, or else to summon a jury to assess the amount of the damage. The bill then charges that the carrying of the railway across the road in question, was not an injurious affecting of the Defendants' farm within the true intent and meaning of the 68th section of the Lands Clauses Act; and it prays, among other things, an injunction

(h) 4 Myl. & Cr. 116.

(l) 15 Jur. 70.

(i) *Ibid.* 249.

(m) 4 Mees. & Wels. 472.

(j) 2 Phill. 330.

(n) 7 Hare, 259.

(k) 5 Adol. & Ell. 163.

restraining the Defendants from taking any proceedings whatever against the Plaintiffs pursuant to their notice, or from taking any other proceedings, under the Lands Clauses Act, for settling the amount of compensation. Upon an application to me, *ex parte*, on the filing of the bill, I granted the injunction in conformity with the prayer, and I did so on the authority of the case of *The London and North-Western Railway Company v. Smith (o)*. That case appeared to me to be an authority precisely in point. There, the complaint of *Smith* was that the Company had carried their railway across a public street, which, by their Act, they had authority to do, and so had greatly incommoded the inhabitants of one end of the intersected street, making the access to their houses much less convenient than it had theretofore been. *Smith*, as one of such inhabitants, had made a claim for compensation, and given the notice for summoning a jury; and the Company, thereupon, filed their bill to restrain *Smith* from proceeding on his notice, on the ground, as in this case, that the act complained of, was not one in respect whereof they were liable to make compensation at all. The late *Vice-Chancellor of England*, in this state of things, refused an injunction, but Lord *Cottenham*, on appeal, granted it; and the ground of his decision was that this Court will not permit a party to put in force the powers given him, by the Act, for assessing the amount of his damage, until he has first established his legal right to some compensation; that is, until he has shown that the damage complained of, is damage in respect of which the 68th section of the Lands Clauses Act entitles the party to redress. There is no mistake as to the grounds on which Lord *Cottenham* proceeded. The course which legislation has taken in these cases, has been this: Formerly the practice was to provide, by each

1851.

SOUTH STAFF-
FORDSHIRE
RAILWAY
COMPANY
v.
HALL.

1851.

SOUTH STAFF-
FORDSHIRE
RAILWAY
COMPANY
v.
HALL.

special Act, that the party claiming compensation, should call, on the Company, to take steps for summoning the jury. If the Company considered the act complained of to be one in respect of which the statute did not entitle the claimant to compensation, they refused to cause the jury to be summoned; and the remedy of the claimant was to call on the Company, by *mandamus*, to take the necessary steps. In this proceeding, the question whether the case was or was not a case entitling the party to compensation, was judicially decided; if in the negative, the *mandamus* was refused, and there was an end to the case; if in the affirmative, a peremptory *mandamus* issued; the jury was summoned and the amount of damage was assessed. But by the general Lands Clauses Act (whether by any previous special acts I am not sure) this course of proceeding was departed from. The Legislature relieved the party claiming compensation from the necessity of applying for a *mandamus*, by enabling him to fix his own amount of damages, where damage within the meaning of the statute, has been incurred, and by compelling the Company to pay that amount unless, within twenty-one days, they take measures for convening the jury. Where, therefore, the Company dispute both the right of the party to recover any damage and the amount claimed, the only course given to them by the statute, is, first, to summon the jury, and then, supposing the jury to assess some amount of damage as due, to refuse payment of the sum so assessed, leaving the party to recover it by action. In such an action, the claimant would be obliged to aver that he had sustained damage within the meaning of the statute. This averment would be traversed; and so the question of right would be determined. If the Company do not dispute the amount claimed, but only deny the right to compensation at all, then they will, of course, refuse to summon the jury, and will leave the party to bring his action for the amount

claimed ; and, in such an action, the right will, at once, be tried. In this state of the law, Lord *Cottenham* had to decide, in the case of *The London and North-Western Railway Company v. Smith*, whether the Company were entitled to any relief, in this Court, by way of injunction restraining the claimant from proceeding to compel them to summon a jury, until he had first established a legal title to something, by showing that the acts complained of were such as constituted damage or injury within the 68th section of the Lands Clauses Act. His Lordship, in his judgment, after remarking that, under the former state of the law, the *mandamus* compelled the claimant to establish his title to relief before he put the Company to the necessity of causing a jury to be summoned for assessing its amount, proceeds as follows : “ Then comes an Act of Parliament, which, for the purpose of correcting a supposed evil, creates a much greater one, by preventing the Company from having the means of ascertaining the preliminary question of right, before they go to the Sheriff’s jury to assess the amount. This state of the statute law alone, would be quite sufficient to justify the interposition of this Court ; because it would not be just to permit a party to be involved in a litigation of this kind, without first ascertaining whether the right claimed does in fact exist. In such a state of circumstances, the only remedy is an equity, which applies to all cases where a party is sought to be affected, as this Company would be, by the provisions of the Act in question, and entitles the party aggrieved to come here for an injunction.” This decision of Lord *Cottenham*’s, appeared to me to be a distinct authority in favour of the Plaintiffs in the present case ; and I granted the injunction accordingly, and I did so without much considering whether or not, if the matter were untouched by authority, I should have come to the same conclusion. It was the decision of the *Lord Chancellor* on appeal,

1851.

SOUTH STAFF-
FORDSHIRE
RAILWAY
COMPANY
v.
HALL.

1851.

SOUTH STAFF-
FORDSHIRE
RAILWAY
COMPANY
v.
HALL.

and, of course, I was bound to follow it in a case where the facts seemed to me to be, in principle, the same ; and, in fact, I have granted more than one injunction acting on that same authority. The argument on the present motion, has led me to consider, more attentively, the principles of Lord *Cottenham's* decision, and I must confess that, with the most profound respect for all which proceeded from that very eminent Judge, I cannot say that I feel convinced by his reasoning. It may be that the alteration introduced into the law by enabling a party claiming compensation to get rid of the *mandamus*, was an unwise change. Still it was the Act of the Legislature. A course of proceeding is chalked out whereby a party alleging that he has suffered an infringement of a legal right, is enabled, in a particular mode of legal proceeding, to obtain legal redress. He cannot get that redress without establishing his title to compensation and the amount of damage he has sustained : and, the Legislature having pointed out the steps by which he is to arrive at that result, what right has this Court to say, to a party affected by no equity whatever : " You shall not proceed to assert your legal rights in the mode prescribed by law ? " I can discover neither principle nor authority for such interference. It was contended that the decision might be supported on principles analogous to those on which this Court relieves against penalties. But I do not think that that argument can be supported. The ground of relief against a penalty, is that, though there is a legal right to the penalty, yet the real meaning of the parties, all along, was that the penalty should be a mere security for something else. Here, no such question can ever arise. The sum claimed is claimed not as a penalty, but as the real amount of damage sustained. This the Company may dispute ; and, unless they do so, they admit the amount claimed to be the fair measure of damage, if any damage has been sustained ; and, though

it may seem that the more reasonable course would have been to compel the claimant first to establish his title to some damage, and then to ascertain the amount, yet I cannot think it a due exercise of the powers of this Court, to say that, because the Legislature has obliged a party to proceed in what appears to us as an inconvenient course, therefore, this Court will step in and compel him to proceed differently. Such an exercise of authority, appears to me to be rather making than administering law.

1851.
 SOUTH STAFF-
 FORDSHIRE
 RAILWAY
 COMPANY
 v.
 HALL.

I have felt warranted in making these remarks on a judgment to which, as being that of a Court of appeal, I should, ordinarily, have been bound to defer, in consequence of the recent decision of the *Lord Chancellor* in the case of *The East and West India Docks and Birmingham Junction Railway Company v. Gattke*. In that case *Gattke* made a claim on the Company, under the 68th section, for a sum of 480*l.*, as compensation for damage alleged to have been sustained by reason of the dust and dirt occasioned by the Company having damaged his goods, and by reason of his customers having been compelled, by the obstruction occasioned by the works of the Company, to quit the side of the road on which the Defendant's shop was situate and to pass on the opposite side; and also by the Company having stopp'd up a lane or passage along which he was entitled to a right of way to the back part of his premises. *Gattke* having made his claim and served a notice, on the Company, calling on them to summon a jury, the Company filed their bill to restrain him from all further proceedings under his notice, on the ground that the case was not one in which, under the 68th section, he was entitled to any compensation at all. Sir *James Wigram*, acting on the authority of Lord *Cottenham's* decision, granted the injunction. But, after much consideration,

1851.
SOUTH STAFFORDSHIRE
RAILWAY
COMPANY
v.
HALL.

the *Lord Chancellor* has dissolved it. And that decision of the *Lord Chancellor* appears to me to be directly in point in the present case. Here, as in that case, the alleged grievance is personal to the complaining party only, and not extending, generally though with different degrees of intensity, to all her Majesty's subjects, as in the case before Lord *Cottenham*.

It was argued, for the Company, that the 68th section applies, not to damage occasioned by the works having been made, that is, by the mere existence of the works, but only to such damage as may have been produced by the works while in progress of execution : and, here, it was said, the claim is wholly for damage occasioned by the existence of the railway as a completed work. Whereas, in *Gatke's case*, some part of the compensation claimed, was for the annoyance produced by the works while in progress. To this argument there appears to be two answers. First : there is nothing on the face of the notice served on the Plaintiffs in this case, which would exclude the Defendants from giving evidence of and obtaining compensation for damage occasioned to them during the progress of the works as well as since the completion of the railway ; and, secondly, (on which I mainly rely) that the question whether, under the 68th section, the Defendants are entitled to compensation for damage resulting from the existence of the railway as a completed work, is a purely legal question, to be settled in the ordinary course of legal proceeding without the intervention of this Court. I may add, further, that, if there were any validity in this distinction, the *Lord Chancellor*, in *Gatke's case*, would not have altogether dissolved the injunction, but have only so modified it as to make it applicable to so much only of the Defendants' claim as related to the injury arising from the railway having been made ; for, there, as in this case, a part at least of the

damage for which *Gatthe* sought relief, had been occasioned, not by the works while in progress, but by the railway having been completed. And, not being able to discover any distinction, in principle, between this case and *Gatthe's*, I shall, certainly, act on that decision, and dissolve the injunction which I granted before that case had been decided. I should probably have felt bound to take that course even if I had not taken the same view of the law as was taken by the *Lord Chancellor*. But I do so the more readily because I cannot but admit the force of the reasoning by which the *Lord Chancellor* justified his judgment in that case. If there is any part of that reasoning the weight of which I do not feel, it is the mode in which his Lordship endeavours to distinguish the case before him from that before *Lord Cottenham*. The only distinction pointed out in the judgment, is that, in *Lord Cottenham's* case, the claimant demanded compensation for what would, in a greater or a less degree, have entitled any one of her Majesty's subjects to make a similar demand. I doubt whether this affords any real distinction in principle. In such a case, it may be much more easy to say, by anticipation, that the claimant must fail in establishing a legal title to damages than if he were proceeding on a complaint of damage affecting his own property alone. Still, what the claimant is asserting, is a mere legal right. Surely, he is at liberty, if he can, to establish this right by the ordinary course of law. *Lord Cottenham's* decision, it must be observed, does not proceed on the ground that the claimant had no legal right, and, so, ought not to be allowed to harass the Company by vexatious proceedings. If that were a principle on which the Court could act, and it had been clear that there was no legal right, then the course adopted for putting the question of right or no right into a train of legal inquiry, would have been unnecessary. The decision proceeded on the assumption

1851.
 SOUTH STAFFORDSHIRE
 RAILWAY
 COMPANY
 v.
 HALL.

1851.

SOUTH STAFF-
FORDSHIRE
RAILWAY
COMPANY
v.
HALL.

that there was a legal question to be decided as to the claimant's right of compensation: but this Court took, into its own hands, the obligation of obtaining the decision of a Court of law on the subject, instead of leaving the claimant to establish it in his own way. I confess, therefore, that the same reasoning which led the *Lord Chancellor* to dissolve the injunction in *Gattke's case*, must, as I should have thought, have led him to a similar decision in *Smith's case*. It is not, however, necessary to discuss this point. For, if there be any validity in the only distinction pointed out, by the *Lord Chancellor*, as existing between the two cases, namely, that the damage complained of in the one case, was a public wrong, and, in the other, a private injury, it is clear that the claim set up in this case ranges itself under the latter head. The damage complained of by the Defendants in this case, affects them and them only; and so must be governed by the decision of the *Lord Chancellor*, and not by that of Lord *Cottenham*.

It is fit that I should advert to an argument pressed on me by the Counsel for the Plaintiffs, only to show that it had not been overlooked. It was urged that the only grievance insisted on by the claimants in this case, was that the railway crossed the approach to their farm on a level, and that the Company had not made such gates, as, under these circumstances, they are, by the Railway Clauses Act, bound to make; and for this, it was contended, the Acts provide a special mode of obtaining redress by application to two justices. The answer to this argument is, first, that though the want of proper gates, is what the claimants point out, in the letter which accompanied their notice, as the subject-matter of their alleged grievance; yet the notice itself does not so limit their complaint; and, secondly, if this be the only grievance, and if a special mode of obtaining redress is given

so as to exclude all right under the 68th section, that will afford the Company a good legal defence against the claim sought to be enforced against them; and, so, no valid distinction, in principle, can be made between such a claim and a claim in respect of which no such special mode of redress is provided.

I am, therefore, of opinion that this injunction must be dissolved.

1851.
SOUTH STAFF-
ORDSHIRE
RAILWAY
COMPANY
v.
HALL.

IN THE WINDING-UP OF THE INDEPENDENT ASSURANCE COMPANY.

HOLT'S CASE.

THIS was a motion, on behalf of the official manager, that *Robert Holt's* name might be replaced on the list of contributories, as the holder of 150 shares.

The provisional directors awarded those shares, in September 1848, to *William Holt*, the managing director, in consideration of his services. *William* and *Robert* were brothers; and, as *William* was the covenantee in the deed of settlement, and, consequently, could not covenant with himself, *Robert*, at his request, executed the deed, on the 2nd of October 1848, as the holder of the 150 shares; and several of the other shareholders executed it after him. In December 1848, the directors, thinking

the deed as the holder of the shares; and several other shareholders executed it after him. Afterwards the directors rescinded the resolution by which they had awarded the shares, and the managing director delivered up the certificates for the shares, to them. The *Master* excluded the brother's name from the list of contributories; but the Court ordered it to be restored.

1851 :
25th April.
Joint-stock
companies
winding-up
Acts.
Contributory.

The managing director of a Company having had 150 shares awarded to him by the provisional directors, in consideration of his services, and being the covenantee in the deed of settlement, his brother, at his request, executed

1851.
HOLT'S CASE.

they had done wrong in awarding the shares to *William Holt*, rescinded the resolution passed on that occasion, and, *William Holt*, at their request, delivered up the certificates for the shares, to them.

Mr. *Bethell* and Mr. *Roxburgh*, in support of the motion, said that the position in which *Robert Holt* had placed himself, with regard to the other shareholders, by executing the deed, could not be altered by a verbal resolution of the directors: that the deed provided only two modes by which a party who had executed it, could be freed from the liability which he had thereby incurred: that one of those modes was transferring his shares, and the other, forfeiting them; and that, as *Robert Holt* had done neither the one nor the other, his liability still continued; and, therefore, the *Master* ought not to have erased his name from the list: *Davidson's case* (a).

Mr. *Cairns*, for *Robert Holt*, said that there was no fraud in this case, as there was in *Davidson's case*; but that the directors, when they allotted the shares, and *William Holt*, when he accepted them, conceived that the directors had authority to make the allotment: that the mistake was mutual: that the directors, when they discovered their error, rectified it, as they were at liberty, and, indeed bound to do: that the covenants in the deed were limited, and applied only to the time during which the covenantor held shares in the Company; and, therefore, if he ceased to be a shareholder, by any means, his liability was at an end: consequently, the *Master* had properly excluded *Robert Holt's* name from the list.

(a) 3 De G. & Smale, 21.

The *Vice-Chancellor*.—Several of the shareholders executed the deed after *Robert Holt*. They may have executed it on the faith that he was a shareholder.

1851.
HOLT'S CASE.

Mr. *Cairns*.—*Robert Holt*, like every other shareholder who executed the deed, agreed to be bound by it so long only as he continued a shareholder. Those who executed it after him, could not know that he still held his shares. He might, for anything that they could know, have either transferred or forfeited his shares.

The VICE-CHANCELLOR :

I do not entertain a particle of doubt upon this case.

What Mr. *Robert Holt's* reason was for executing the deed of settlement, is a matter which it is too late to speculate upon when he has executed it. Because, by executing it, he entered into engagements with persons who were wholly ignorant as to the circumstances connected with the shares in respect of which he executed the deed. Every one of those individuals executed the deed on the faith that every person who executed it, should, to the extent of the shares for which he executed it, bear the common liability and participate in the profit to be derived from the undertaking.

Now let us see what the terms of the deed are. It begins by reciting the intention to form a Company to be called *The Independent Assurance Company*: to raise 100,000*l.* by 8000 shares of 12*l.* 10*s.* each, and that, on each share, there shall be a deposit of 1*s.* 3*d.* per share payable on the original taking up of the same. Then it recites that the provisional directors have made an allotment of shares in the Company, commencing with No. 1 and ranging, in a consecutive series, up to the

1851.

HOLT'S CASE.

number 2311 ; and that, subscriptions to the Company having been opened, the provisional directors have retained to themselves, and, upon the application of the several other parties thereto, that is Mr. *Robert Holt* among others, have apportioned, to them, the shares in the Company set opposite to the names of themselves, the directors, and such other parties respectively, in the first schedule thereto annexed (that includes the 150 shares allotted to Mr. *Robert Holt*) ; and that the directors and the other parties have paid, to the bankers of the Company, the deposit of 1s. 3d. on the shares subscribed for by them respectively. Then the deed witnesses, and it is thereby declared, between and by the several persons parties thereto, and each of such persons, except Mr. *William Holt*, so far as relates to the acts, deeds and defaults of himself or herself, and of his or her heirs, executors and administrators, and not further or otherwise, doth thereby, for himself and herself, and his and her heirs, executors and administrators, severally and respectively, covenant, with the said *William Holt*, his executors and administrators, that all the said several persons parties to the deed who are thereafter denominated by the title of shareholders (that includes Mr. *Robert Holt*), and the several other persons who shall become shareholders as thereafter mentioned, shall, *while holding shares in the capital of the Company*, be and continue, until the Company shall be dissolved under the provisions thereafter contained, a Company in manner thereafter mentioned : and that each of such shareholders, will, when required, pay up the amount of the instalments payable on the shares taken by him or her respectively, and perform the several covenants therein contained on the part of the shareholders. The deed then provides for the shareholders transferring their shares and for their forfeiting their shares : and it

points out no other mode by which the shareholders can cease to be such. Now Mr. *Cairns's* argument was that the liabilities which the shareholders incurred by executing that deed, continued only while they were holding shares. But my opinion is that, according to the true intent and meaning of the deed, those liabilities continued until the parties ceased to fill the character which they represented themselves as holding, that is, until they ceased to be shareholders in one or other of the modes *pointed out by the deed*; and, as Mr. *Robert Holt* has neither transferred nor forfeited the shares, as the holder of which he executed the deed, and as, by executing it, he entered, impliedly, into obligations with all the other persons who executed it, it appears to me that he must bear his share of the liabilities which he incurred. Consequently, his name must be restored to the list of contributories, and the official manager must have his costs out of the estate.

1851.
HOLT'S CASE.

I do not believe that any fraud was intended by the directors. They conceived that what they did was right; and, when they found that it was wrong, they undid what they had done.

1851 :
May 28th.

*Joint-stock
companies
winding-up
Acts.*

*Contributory.
Acceptance of
shares.*

The secretary to a Company wrote to *A.*, a member of the provisional committee, informing him that the managing committee had apportioned one hundred shares to each member of the provisional committee, and requesting to be informed, on or before a certain day, whether *A.* would take that or any less number of shares, otherwise the committee would consider that he declined taking any. *A.*, in answer, requested that the one hundred shares might *be reserved for him*. The Court directed an issue to try whether *A.* had accepted the shares.

IN THE WINDING-UP OF THE DIRECT
BIRMINGHAM, OXFORD, READING AND
BRIGHTON RAILWAY COMPANY.

ONIONS'S CASE.

THE secretary to the Company wrote a letter to Mr. *Onions*, a provisional committee-man, dated *Moorgate Street*, 10th of October 1845, and in the following words :
“ Sir : I am requested to inform you that the committee of management has apportioned one hundred shares in the Company, to each member of the provisional committee. You will please inform me, on or before Wednesday morning next, whether you will take that or any less number of shares. Should you not reply by that time, the committee will consider you decline taking any.”
Mr. *Onions's* answer to that letter was dated *Brosley*, the 14th of October 1845, and was as follows : “ Sir : In reply to your circular of the 10th instant (which only came to hand this morning) informing me that I am entitled to one hundred shares in the Direct *Birmingham, Oxford, Reading, and Brighton* Railway Company, and requesting an answer on or before to-morrow morning, *I have to request that number of shares may be reserved for me.*”

The question was whether Mr. *Onions's* letter amounted to an *acceptance* of the shares.

The VICE-CHANCELLOR said that his acquaintance with mercantile language was not sufficient to enable him to decide that Mr. *Onions* had accepted the shares by requesting that they might be reserved for him; and that he should direct an issue, in order that the question might be determined by a jury.

1851.
ONIONS'S
CASE.

Mr. *Bethell*, Mr. *Rolt*, Mr. *W. T. S. Daniel* and Mr. *Roxburgh*, were the Counsel in the case.

IN THE WINDING-UP OF THE DIRECT
BIRMINGHAM, OXFORD, READING AND
BRIGHTON RAILWAY COMPANY.

UPFILL'S CASE.

THE above-mentioned Company was registered provisionally only. After Mr. *Upfill's* name had been placed on the list of contributories pursuant to the decision of the House of Lords (a), the *Master* made an order for a call, of 2*l.* 12*s.* 6*d.* per share, upon that gentleman and certain other persons named in the list. That order was founded on a financial statement made by the official manager, from whence it appeared that certain debts remained due from the Company: but there was nothing to show that Mr. *Upfill* or any of the other individuals on whom the call was made, were liable to pay the debts

1851:
1st, 2nd and
28th May.
Joint-stock
companies
winding-up Acts.
Contributory.
Call.

The *Master* ought not to make a call on any contributory, until he has ascertained that the contributory is liable to pay the debt or debts in respect of which the call is made.

(a) See *Hutton v. Upfill*, 2 House of Lords Cases, 674.

1851.

UPFILL'S
CASE.

in respect of which the call was made; and, on that account,

Mr. *Rolt* and Mr. *W. T. S. Daniel*, for Mr. *Upfill*, now moved that the order for the call might be discharged. They said that a state of facts ought to have been laid before the *Master*, before he made the order, showing that the debts were incurred after Mr. *Upfill* had consented to be a provisional committee-man and to take shares in the Company; and showing also which of the debts were incurred by Mr. *Upfill's* order or under his authority, and that they were necessarily incurred in launching the concern: that the liability to be a contributory and the liability to a call, were not the same thing: that the question as to Mr. *Upfill's* liability to the call, was still open, notwithstanding the decision of the House of Lords: that that decision had established only one step towards his liability; and that the *Master* had no power to make a call upon a contributory, until he had ascertained that the contributory had, either expressly or impliedly, given authority to incur the debt for payment of which the call was made, or had guaranteed the payment of it. They referred to the judgment in *Hutton v. Upfill*, pages 691, 692 and 694, and to *Lloyd's case* (b), *James's case* (c), *Bell v. Lord Mexborough* (d) and the 83rd section of the Winding-up Act of 1848, 11 & 12 Vict. c. 45.

Mr. *Bethell* and Mr. *Roxburgh*, for the Official Manager, said that the judgment of the House of Lords decided that, from and after the date of the letter in which Mr. *Upfill* said: "I accept the one hundred shares allotted to me," the provisional committee had power to

(b) *Ante*, 248.(c) *Ante*, 140.

(d) 5 Railway Cases, 149.

bind him by their acts and engagements, and all things done by them, were done as his agents (*e*). They relied on the 28th section of the Winding-up Act of 1849, 12 & 13 Vict. c. 108; and, in order to show its full force, contrasted it with the 84th section of the Act of 1848, which it repealed. They further said that the order for winding up a company, was equivalent to a judgment in favour of all the creditors of the Company: that the selection of the parties to pay the call, and the distribution of the call amongst them, were equally at the unrestricted discretion of the *Master*: that, if there were sixty persons on the list of contributories, the *Master* might order one of them to pay ten shillings, and another ten pounds; or any one of them to pay the whole amount of the call; and that too, notwithstanding there might be, eventually, one hundred contributories; and, that the party or parties who had paid the call, might require the *Master* to compel contribution from the other contributories; which the *Master* had power to do under the Acts.

1851.
UPFILL'S
CASE.

The *Vice-Chancellor*.—Mr. *Bethell* has, to a great extent, satisfied me that, if *Upfill* was liable, with others, to debts amounting to 1000*l.*, the *Master* might make a call, to pay that sum, upon *Upfill* alone. But I cannot think that the *Master* might make a call, upon him alone, to pay the whole of the debts of the Company, amounting, perhaps, to 100,000*l.*

Mr. *Rolt* replied.

The VICE-CHANCELLOR :

20th May.

The question in this case, arises upon an order of the

(*e*) See 2 House of Lords Cases, 691.

1851.

UPFILL'S
CASE.

Master of the 20th of December 1850, whereby he has ordered a call, of 2l. 12s. 6d. a share, on several contributories who are named in the order, including Mr. *Upfill*. A motion was made, before me, to discharge that order.

The decision of the House of Lords in *Upfill's case*, established this proposition, simply; that Mr. *Upfill* was to be placed on the list of contributories, as a contributory in respect of one hundred shares. Then the question arises, what is the effect of that decision? According to the interpretation-clause in the Winding-up Act, it decides that Mr. *Upfill* is liable to contribute to the payment of some debt of the Company, that is, according to the construction which has been put upon these words, to some debt of the body of persons that were associated for forming the Company. The last words of Lord *Brougham's* judgment in *Upfill's case*, negative the notion that merely being placed on the list of contributories, at all showed what was the extent of the liability of the contributory. The being a contributory in respect of one hundred shares not showing in respect of what he is to contribute, it would seem to follow, of course, that it does not show in respect of what debts he is to contribute. Now the power of the *Master* to make calls, depends on sect. 83 of the first Act, and sect. 28 of the second Act. Sect. 83 enacts: "That at any time before the whole of the assets of the Company shall have been collected or converted; and, if the assets remaining to be collected or converted shall not be capable of being immediately realized, although such assets may not appear to be insufficient; and also, after the assets of the Company shall have been wholly exhausted, it shall be lawful, for the *Master*, from time to time, to make calls on the contributories, or on such individual contributories or classes of contributories as he may think proper (but

so far only as such contributories respectively shall be liable, at law or in equity, to pay the same) as well for raising such amount as may be necessary to pay the debts or liabilities, or any of the debts or liabilities of such Company, or any part thereof, or the costs, charges and expenses of winding up the same ; as also for the purpose of adjusting and settling the respective claims of contributories upon each other, or upon the Company, whether such claims shall have arisen since or before the date of the petition for dissolution and winding-up, or for winding-up, as the case may be," and for payment of the costs. Then there is, in section 84, a direction as to apportioning the amount of the calls ; but I do not pay any attention to that, because, by the subsequent Act, that clause was expressly repealed and a new clause introduced instead, namely, section 28, which enacts as follows : " That so much of the said recited Act as is contained in the section thereof numbered 84 " (that is the section to which I have alluded) " shall be repealed ; and, in lieu thereof, that, when the *Master* shall think proper to raise any money by means of a call, he shall make such call, from time to time, upon the contributories of the Company or any of them, appearing, for the time being, on the list of contributories, although it may then be under consideration or uncertain whether other persons ought or ought not to be included in the list ; and, in making any such call, it shall be lawful, for the *Master*, to fix such an amount *per* share for the same, as shall, in his judgment, be likely to supply and bring in the whole sum for the time being intended to be raised, after taking into consideration the probability that some of the contributories upon whom the said call shall be made, should, partly or wholly, fail to pay their respective proportions of the same." Therefore, the *Master* has power, when he has got the list of contributories, to make calls :

1851.

UPFILL'S
CASE.

1851.

UPFILL'S
CASE.

and he is to make a call for such a sum of money as shall appear to him will probably be sufficient to raise the sum to be raised, having regard, *inter alia*, to the circumstance that some of the contributories, if such should appear to be the fact, may be unable to pay at all. Taking these two clauses together, it follows that the *Master* has an absolute power to make a call on any contributory: that is, by reasonable intendment, to make a call to the full extent of the whole sum to which the contributory could be made liable at law, besides the costs. The party on whom the call is made, has no right to complain because others may be liable to the same debt: that must be made matter of after arrangement between himself and his co-contributories. But, certainly, the Legislature could not have intended to authorize the *Master* to make a call, on a contributory, for payment of debts in respect of which he is not liable; and so to leave the contributory, afterwards, to get repaid by those who are liable. I confess I should be inclined even to torture the language of the Act of Parliament to exclude such a construction; it is so manifestly absurd and unjust. But, in fact, no such violence is necessary; for section 83 fully meets the case. That section, which authorizes the call, expressly limits the right to make the call to be made, so far only as the contributories shall be liable, at law or in equity, to pay the debts in respect of which the call is made. That is the language of the Act of Parliament: and it is obvious that that must have been the meaning: for any other construction would lead to the notion that the Legislature had, wilfully, committed an act of the grossest injustice; that the *Master* should have the power to make contributory A., who, perhaps, may be only liable, altogether, to pay 100*l.*, liable to pay a call of 1000*l.* made for payment of other debts. Such a construction would be manifestly unjust and absurd. It

1851.

UPFILL'S
CASE.

follows, therefore, from this, as I think, that the *Master* cannot make a call on any contributory until he has decided that he is liable to the payment of the debt or debts in respect of which the call is made. In respect of Companies fully formed and completely registered, where the affairs wound up are strictly partnership concerns, this difficulty does not occur : but, where the affairs wound up are affairs, not of a partnership the members of which are all liable to every debt, but of an association of persons liable, some to one creditor and some to another, there, the most obvious principles of justice require that, before a call is made upon any contributory, the liability in respect of which it is made, should be ascertained. Perchance the contributory may choose to pay the whole debt off, himself. It may be a small debt, and he may prefer paying it off, rather than be involved in further litigation about it. If the *Master*, having ascertained the liability of Mr. *Upfill*, had exercised his discretion as to the proper amount of call, I should have been very unwilling to interfere with his discretion. But, here, the *Master* has proceeded upon what appears to me an erroneous principle ; and, therefore, the appeal under section 99 of the first Act, which authorizes the appeal, is quite proper. I shall, therefore, discharge this order for the call, on the ground that no call ought to be made, on any contributory, till the *Master* has ascertained him to be liable, either alone or jointly with others, to the discharge of the debts in respect of which the call is made. I am aware that, beyond this, the contributory may be further liable for a share of the costs of the winding-up : but this does not seem to me to vary the principle.

The question, as to what are the debts and liabilities to which Mr. *Upfill* is liable, is not properly before me. The *Master* must decide that : and then, any party dissatis-

1851.
 UPFILL'S
 CASE.

fied with his decision, may bring the case before the Court by way of appeal.

Order discharged, with costs out of the estate.

1851 :
 1st and 2nd
 May.
 Joint-stock
 companies
 winding-up
 Acts.
 Certificate.
 Contributory.

IN THE WINDING-UP OF THE SHREWSBURY AND LEICESTER DIRECT RAILWAY COMPANY.

EX PARTE RIDDELL.

The *Master* certified that he had included *A.*'s name in the list of contributories, not as a shareholder, but as a contributory in respect of any expenditure which he might be proved to have incurred.

The Court held the certificate to be informal, and directed the *Master* to review his certificate, with liberty, to either party, to adduce further evidence.

RIDDELL was a member of the provisional committee and a trustee of the Company, but not an allottee of shares in it. The *Master* charged with the winding-up of the Company, certified that he had included *Riddell's* name in the list of contributories: "not as a shareholder, but as a contributory in respect of any expenditure which he might be proved to have authorized."

Mr. *Rolt* and Mr. *W. T. S. Daniel*, for *Riddell*, now moved that his name might be expunged from the list, on the ground that the evidence produced before the *Master* on the part of the official manager, did not show that *Riddell* had contracted or authorized the contracting of any debt or the incurring of any expenditure.

Mr. *Bethell* and Mr. *Glasse*, for the official man-

ager, said that, in November 1845, *Riddell* attended a meeting held at the Company's offices, and concurred in resolutions which authorized the incurring of expense.

1851.
RIDDELL'S
CASE.

The VICE-CHANCELLOR said that the certificate was incorrect in point of form: that the *Master* ought to have ascertained that *Riddell* had authorized the incurring of some expense and to have made him a contributory in respect of it: that it appeared that he had concurred in a resolution for appointing a gentleman, named *Jellicarse*, secretary to the Company, at a salary of 350*l. per annum*, in respect of which he was liable; and therefore, it must be referred back, to the *Master*, to review his certificate, with liberty to either party to adduce further evidence; and that *Riddell's* costs of the application must be paid by the official manager.

1851.
24th and 29th
January
and
5th May.

Trustee Act,
1850, 13th and
14th Vict. c. 60.
Trustee.

The surviving trustee of a sum of stock, neglected, for twenty-eight days after a request in writing had been made to him by persons who had been duly appointed new trustees, to transfer the stock to them. The Court held that they were *persons absolutely entitled* to the stock, within the meaning of the Trustee Act, 1850, and ordered the stock to be transferred to them.

IN THE MATTER OF THE TRUSTEE
ACT, 1850.

EX PARTE RUSSELL.

IN February and April 1846, *M. Lievesley* and *John Russell* and *Eliza* his wife, purchased certain sums of stock, and caused them to be transferred into the names of *M. Lievesley* and *J. T. Schomberg*; and, by a deed-poll dated the 16th of May 1846, they declared that *Lievesley* and *Schomberg*, should stand possessed of those sums in trust for *Mrs. Russell*, for her separate use for life, remainder in trust for *Mr. Russell* for life, remainder in trust for the children of *Mr. and Mrs. Russell* as tenants in common absolutely: and they further declared that, so often as any trustee or trustees of the deed, should die or decline to act or become incapable of acting, it should be lawful for *Mr. and Mrs. Russell* or the survivor of them, and, after the decease of the survivor, then for the trustees or trustee of the deed or the executors or administrators of the survivor of them, to appoint new trustees or a new trustee, as the case might be. *Lievesley* died in September 1849. *Schomberg* never accepted the trusts, and declined to act therein on *Lievesley's* death. In consequence of which, *Mr. and Mrs. Russell*, by a deed-poll dated the 27th of November 1850, and in exercise of the power reserved to them by the declaration of trust, appointed two gentlemen, named *Dixon* and *Hooper*, trustees of the stock; and, on the 30th of the same month, *Mrs. Russell* caused to be delivered, to *Schomberg*, a notice in writing, signed by her, whereby, after stating the appointment of *Dixon*

and *Hooper* to be such trustees, she requested *Schomberg* to receive the dividends of the stock which were payable at, or had become payable since *Lievesley's* death, and to pay them to her, or to *Dixon* and *Hooper*, upon or for the purposes of the trusts declared as before mentioned, and also to transfer the capital, to *Dixon* and *Hooper*, upon the same trusts; and Mrs. *Russell*, thereby, gave *Schomberg* notice that, unless he complied with her request within the time mentioned in the Trustee Act, 1850, she would apply, to the Court, to make an order vesting the sole right to transfer the stock and to receive the dividends thereof, in such person or persons as the Court should deem fit to appoint for such purposes.* *Schomberg* did not comply with the request. In consequence of which a petition was presented on the 14th of January 1851, by Mrs. *Russell* by her next friend, (her husband being out of the jurisdiction,) and by her daughter and only child, *Clementina Russell*, an infant, by her next friend, and also by *Dixon* and *Hooper*, stating the facts above mentioned, and also that the stock was then standing in the sole name of *Schomberg*, * as the survivor of the trustees named in the declaration of trust, and praying that the right to transfer the stock and to receive the dividends which had accrued due thereon as before mentioned, might be vested in *Dixon* and *Hooper*, to be held, by them, upon the trusts declared by the declaration of trust.

1851.
RUSSELL'S
TRUST.

* Sic.

Mr. *Bevir* appeared in support of the petition.

The VICE-CHANCELLOR:

29th January.

I have found great difficulty in this case. Some of

* The petition, appears to have been presented under the 23rd sect. of the Act, which is stated in the judgment.

1851.
RUSSELL'S
TRUST.

the provisions of the Act under which this petition has been presented, are useful ; others create great embarrassment.

It appears, from the petition, that Mr. and Mrs. *Russell*, subsequently to their marriage, transferred certain sums of stock into the names of two trustees, in trust for Mrs. *Russell* for life, and, after her death, in trust for Mr. *Russell*, for life, and, after the death of the survivor of them, in trust for their children. The stock was transferred without obtaining the consent of one of the trustees. Then Mr. and Mrs. *Russell* executed a deed-poll declaring the trusts of the stock. One of the trustees is since dead ; the other is still living ; and he refuses to transfer the stock, or to act, in any manner, as a trustee. Under these circumstances, Mr. and Mrs. *Russell* appointed new trustees under a power in the deed-poll. Then, in order to get the stock transferred to the new trustees, Mrs. *Russell*, her child, and the new trustees present a petition under the 23rd section of the Act, which says that, where any sole trustee of any stock or *chose in action*, shall neglect or refuse to transfer such stock or to receive the dividends thereof, or to sue for or recover such *chose in action* or any interest in respect thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made, to him, *by the person absolutely entitled thereto*, it shall be lawful, for the Court of Chancery, to make an order vesting the sole right to transfer such stock or to receive the dividends or income thereof, or to sue for and recover such *chose in action* or any interest in respect thereof, in such person or persons as the said Court may appoint. Now, supposing that the proper notice had been given and that the proper petition

had been presented, what order ought the Court to make? The obvious meaning is to vest the stock in the new trustees. But the 23rd section does not authorize that. All that it authorizes the Court to do, is to make an order vesting the sole right to transfer the stock in such person as the Court may appoint. But, if I were to make an order vesting the sole right to transfer the stock in the new trustees, they could not make a transfer to themselves; and, therefore, some person must still be appointed to transfer it to them. However, on looking at the Act, I find that, under the 20th section, I may order the secretary of the Bank to transfer the stock to the new trustees. But then another embarrassment arises: for, under the 23rd section, the order for vesting the right to transfer in the new trustees, cannot be made unless the request to make the transfer shall have been made by the person absolutely entitled to the stock; which must mean, not a person entitled only to a life-interest, but a person absolutely entitled to the capital. If I had any doubt as to the meaning of those words, I must construe them by reference to the former Act of 11 Geo. IV. & 1 Will. IV. c. 60. The words of the 10th section of that Act are that, if the trustee shall neglect or refuse to transfer such stock, or *receive and pay over the dividends thereof to the person entitled thereto, or to any part thereof respectively*, for thirty-one days next after a request in writing, for that purpose, shall have been made, to him, by the person entitled as aforesaid. As those words are not found in the latter Act, I must presume that they were left out advisedly, and that the request cannot now be made by any one except the person entitled to the whole fund.

I think, however, that I can see my way out of the difficulty: at least, if a case before Lord *Langdale* be cor-

1851.
 RUSSELL'S
 TRUST.

1851.

RUSSELL'S
TRUST.

rectly reported.* Under section 23, an order cannot be made except after an application by the person absolutely entitled. But section 37 provides that an order, under any of the former provisions, for the appointment of a new trustee or trustees, or concerning any lands, stock, or *chose in action* subject to a trust, may be made upon the application of any person beneficially interested in such lands, stock, or *chose in action*, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof. That section does not alone authorize it, but only says that where, under former sections, the Court has power to order any act to be done, that act may be done on application by the trustee, as well as by a person beneficially interested. Still, you are thrown back upon the former sections; and I do not think that an order can be made under sect. 23, except on an application by a person absolutely entitled. Lord *Langdale*, however, is reported to have decided that a trustee is a person absolutely entitled under the other sections of the Act. He is, in effect, the person absolutely entitled to have the fund transferred to him; and, therefore, if the old trustee should refuse to transfer for the space of twenty-eight days after an application made to him by a trustee duly appointed, the case will be brought within the Act. This construction may, at any rate, be a very convenient one, and may enable me to get out of the difficulty; but not upon this petition. There must be an application, by the new trustees, to the old trustee, and a refusal, on his part, to transfer; and then, upon another petition, I should be enabled to make the order.

Under these circumstances I shall dismiss the petition

* His Lordship did not mention the name of the case.

but without prejudice to any other application that the parties may be advised to make.

1851.
RUSSELL'S
TRUST.

On the 8th of March, 1851, the Petitioners presented another petition, stating the notice of the appointment of *Dixon* and *Hooper* to be the new trustees and the request to receive and pay over the dividends of the stock to Mrs. *Russell* and to transfer the capital to *Dixon* and *Hooper*, to have been given and made by those gentlemen to *Schomberg*, on the 31st of January preceding, and that he had refused to comply with the request. That petition was heard on the 5th of May, 1851; and an order was then made for the transfer of the stock to *Dixon* and *Hooper*.

1851:
31st March and
1st and 3rd
April.

Agreement.
Injunction.
Interim—inter-
ference.

Injunction to restrain the Defendants from entering into an agreement with another railway Company, which would be a violation of or inconsistent with a subsisting agreement between the Plaintiffs and the Defendants, refused; the inconvenience to arise from granting the injunction, being greater than the inconvenience to arise from refusing it.

In what cases the Court will interfere to preserve property in litigation, *in statu quo*.

THE SHREWSBURY AND CHESTER v. THE SHREWSBURY AND BIRMINGHAM RAILWAY COMPANY.

ON the 12th of July, 1850, the following deed was made between the above-mentioned incorporated Companies: "Whereas the said Companies have, for several months past, jointly carried on the traffic, over and along their respective lines of railway, in passengers, parcels, minerals, live stock and other matters and things arising at *Wolverhampton* or places beyond, southwards, and destined for *Saltney* or *Chester* or places beyond *Saltney* or *Chester*, northwards, and *vice versa*: And whereas such traffic is hereinafter designated, "through traffic:" And whereas the said two Companies are desirous of making the joint conduct and carrying on the through traffic by them, perpetually binding upon each other: Now these presents witness that, for effectuating the said desire, it is, hereby, mutually agreed between the said Companies, and the said *Shrewsbury* and *Birmingham* Railway Company, so far as the covenants and agreements hereinafter contained are to be observed and performed by them or their successors, do, hereby, for themselves and their successors, covenant with the said *Shrewsbury* and *Chester* Railway Company and their successors, and the said *Shrewsbury* and *Chester* Railway Company, so far as the covenants and agreements hereinafter contained are to be observed and performed by them or their successors, do, hereby, for themselves and their successors, covenant with the said *Shrewsbury* and *Birmingham* Railway Company and their successors, in manner following, that is to say: First: That each of the

said Companies parties hereto, shall and will, at their own proper costs and charges, provide engines and carriages and other necessary matters and things, and, therewith, convey and carry and accommodate, upon their respective railways, all the through traffic, and shall use their best endeavours to promote and extend, convey and carry, with energy and punctuality, the through traffic; *and neither of the said Companies shall enter into any arrangement with any other Company or person, which shall cause it to be the interest of such Company to fail in, or shall prevent or obstruct the Company party hereto entering into such arrangement, from faithfully carrying out the purposes of these presents*; and, in the event of either Company, directly or indirectly, diverting or continuing to divert, or causing or permitting to be diverted, any portion of the through traffic, from the railway of the other Company, the Company entering into such arrangement, or doing or causing or permitting to be done any such act, shall pay, to the other Company, the sum of 50*l.* per week, as and for liquidated damages, over and above and in addition to the due proportion and amount of fares, rates and tolls to which the other Company would be entitled, by virtue of these presents, as and for their share of the rates, fares and tolls arising from such traffic, if the same had not been so diverted: Second: That the through traffic shall be booked through, over the whole extent of the railways of the said two Companies parties hereto, and shall be carried through without trans-shipment; and that the rates, fares and tolls taken in respect of the through traffic, shall be divided between the said two Companies, in proportion to the length of their respective railways traversed by such through traffic: Third: That the engines, coaches, waggons and other carriages, or any or either of them, of each Company,

1851.
 THE SHREWS-
 BURY AND
 CHESTER
 v.
 THE SHREWS-
 BURY AND
 BIRMINGHAM
 RAILWAY CO.

1851.

THE SHREWS-
BURY AND
CHESTER

v.

THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO.

may pass over or along the line of railway of the other Company, from the day of the date of these presents, upon such terms and under such conditions and restrictions, and subject to such provisions as are now existing or shall, from time to time, be mutually agreed upon between the said Companies, and, in the event of difference between them, as shall be settled by arbitration as hereinafter provided: Fourth: That, for carrying into full effect the purposes of these presents, each Company shall be bound by and perform and fulfil all such rules, orders and regulations as have been, or shall be agreed to by the said two Companies, or, in the event of a difference between them, as shall be determined on by arbitration as hereinafter provided; and, in default thereof, the other Company may, at the expense and risk of the defaulting Company, from time to time, carry out and execute such rules, orders and regulations: Fifth: That it shall be competent, to either Company, to put an end to the arrangements intended to be hereby made, by giving, from time to time, a notice in writing, signed by the secretary of such Company, of their intention so to do, to the other Company; and the said arrangement shall, in that case, be at an end at the expiration of three years from the giving of such notice: Sixth: That any such notice may be withdrawn by the Company giving the same; and, thereupon, the arrangements hereby intended to be made, shall continue in force as though such notice had not been given: Seventh: *That, from and after the expiration of the said term of three years, the Company receiving such notice, unless the same be withdrawn, shall be, for ever, entitled to use, with their engines and carriages and otherwise, the railway and the works and conveniences connected therewith of the other of the said Companies, for the purposes of through traffic, in as full and ample a manner as the Company owning the same could use the*

same ; and the Company which shall give such notice as aforesaid, shall and will, for the purposes aforesaid, at all times, afford every accommodation in stations, sidings, booking places, offices and servants, wharves, warehouses and the use of their cranes and water cranes to the engines, coaches, waggons and other carriages of the other Company passing over or along their line of railway, and to the passengers, parcels, goods, minerals, live stock and all other traffic matters and things whatsoever carried by the said Company, unless the other Company shall think fit to provide and maintain, separately and at their separate expense, any sidings, booking-places, officers and servants, wharves, warehouses, cranes and water cranes at any station or stations for the time being on the line of the railway of the Company giving such notice, and which it shall be lawful for them to do without the further consent of that Company: Eighth: That, in respect of such use and accommodation as is mentioned in the last clause of these presents, the Company enjoying the same, shall pay, to the other Company, half of such a proportion of the whole rates, fares or tolls charged by the first-mentioned Company, (after deducting, from such rates, fares or tolls, the usual terminal charges) as the length of the railway of the other Company traversed, bears to the whole distance traversed by the through traffic in respect of which such rates, fares or tolls are charged; and that, in the event of difference between the said two Companies, as to the amount of the terminal charges to be so deducted, the same shall be fixed by arbitration as hereinafter provided: Ninth: That, in the event of any of the differences hereinbefore referred to, or any difference as to the true intent and meaning of these presents arising between the said two Companies, the same shall be settled and determined by arbitration in the same manner as a dispute is directed to be settled by sections 128

1851.

THE SHREWS-
BURY AND
CHESTER
v.
THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO.

1851.

THE SHREWS-
BURY AND
CHESTER
v.
THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO.

to 134, both inclusive, of the Companies Clauses Consolidation Act 1845: Tenth: That all words and expressions used in these presents, shall have the meanings which are assigned to them respectively in the Companies Clauses Consolidation Act 1845 and the Railway Clauses Consolidation Act 1845 respectively: and a notice under this deed shall be given or served as a notice is authorized to be served by section 135 of the first-mentioned of the said two Acts."

The Defendants being about to enter into an agreement with the *London* and North-Western Railway Company, which the Plaintiffs considered would be a violation of or inconsistent with the agreement between them and the Defendants, the bill was filed, on the 20th of March 1851, to restrain the Defendants from entering into that agreement. It alleged that no notice had been served on the Plaintiffs pursuant to the fifth provision of the agreement; and that the Plaintiffs had acted in conformity with that agreement ever since it was executed; and so also had the Defendants up to the time of the provisional or preliminary agreement thereafter mentioned,* and that the Plaintiffs had entered into divers extensive carrying contracts, for extensive periods, with divers persons on the faith thereof, on which they were liable to large amounts: That the half-yearly meeting of the shareholders of the *Shrewsbury* and *Birmingham* Railway Company, took place on the 12th of February 1851: That the report of the directors submitted to that meeting, was not adopted, and a committee of inspection was appointed, which consisted of certain shareholders of the *Shrewsbury* and *Birmingham* Company, one of whom was

* The proposed agreement between the Defendants and the *London* and North-Western Railway Company.

named *Scott*; and, after the appointment of such committee, the meeting was adjourned until the 12th of March then next: That the adjourned meeting was held on that day, and the committee so appointed as aforesaid, made a supplementary report thereat, which was as follows: "Supplementary report of the committee of inquiry to the shareholders of the *Shrewsbury and Birmingham Railway*.—Your committee have further to report that their negotiation with the *London and North-Western Company*, has terminated in the adoption of the following preliminary arrangement, the memorandum as to which has been signed, by Mr. *Stewart*, on behalf of the *London and North-Western Company*, and by Mr. *Scott*, on your behalf, and which we now beg to submit to the shareholders for their consideration and approval. The *London and North-Western Railway Company* to work over the *Shrewsbury and Birmingham* line (and the *Madeley* branch if and when made), and to have the stations and other conveniences, and all the powers and facilities for that purpose of the *Shrewsbury and Birmingham Railway Company*, from the 25th of March 1851 till the 25th of March 1872, on the following terms: The traffic to be fairly and fully worked, by the *London and North-Western Company*, with a view to its development, and a competent amount of through traffic to be accounted for, over the line, by the *London and North-Western Company*; the *Stour Valley* line to be opened within six months from this time: *The Shrewsbury and Birmingham Company*, themselves, to cease being carriers, and to keep an account of the maximum tolls calculated on all traffic carried over the line except by the *London and North-Western Company*, and also of all their (the *Shrewsbury and Birmingham Railway Company's*) receipts from all other sources, and all those sources of revenue to be made as profitable, to the *Shrewsbury and Birmingham Company*, as possible: The *London and*

1851.

THE SHREWS-
BURY AND
CHESTER
v.
THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO.

1851.

THE SHREWS-
BURY AND
CHESTER

v.

THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO.

North-Western Company to pay, to the *Shrewsbury and Birmingham* Company, such a proportion of their gross earnings as carriers over the *Shrewsbury and Birmingham* line (and branch if made), as will make up, when added to the maximum tolls and other receipts and revenues mentioned in the last article, the following sums annually, *plus* an annual sum (in each year) of 500*l.*; namely, first, The interest on the debenture-debt for the time being owing by the *Shrewsbury and Birmingham* Railway Company; second, The dividend payable upon the preference-stock now issued by the *Shrewsbury and Birmingham* Company, amounting to 135,000*l.* stock; third, Interest, upon the ordinary share capital of the *Shrewsbury and Birmingham* Company, at the following rates, and to be payable half-yearly, that is to say, for the first two years, at the rate of three *per cent. per annum*; for the second two years, at the rate of three and a half *per cent. per annum*; for the remainder of the time to the 25th day of March 1872, at the rate of four *per cent. per annum*: *The London and North-Western Company to take over the stock of engines, carriages &c.*; the amount to be invested, when agreed, in the *Madeley* branch or other new works required, or in the reduction of the debt: until such investment, the *London and North-Western* Company to pay four *per cent.* thereon; and the *London and North-Western* also to adopt the contracts with *Kinder and Johnson*, and the contracts, if any, for maintenance of way and for stations, or any other such contracts connected with the ordinary working of the line: all contracts existing for the purchase or lease of land on the part of the *Shrewsbury and Birmingham* Company, to be added to the capital of the *Shrewsbury and Birmingham* Company within the limits aforesaid; and interest paid thereon accordingly: The *Shrewsbury and Birmingham* Company's bill in Parliament to be prosecuted wholly or partially, or abandoned as hereafter ar-

ranged with the *London and North-Western Company*, and the *alleged contracts between the Shrewsbury and Birmingham, and Great Western and Shrewsbury and Chester Companies* (*which the Shrewsbury and Birmingham Companies' Counsel advise to be inoperative*) are not to be made binding on the *London and North-Western Company*: In consideration of this agreement, the railway stations, buildings and works to be maintained, by the *London and North-Western Company*, in good condition and repair: All sums, if any, required to be laid out for additional works or stations for the proper working of the line, to be provided, at the request of the *London and North-Western Company*, under the borrowing powers of the *Shrewsbury and Birmingham Company*, and added to the debenture capital of the Company, and interest paid thereon accordingly: This agreement to be subject to the approval of the shareholders of both Companies, and treated as the basis of a formal contract for effecting the objects in view, consistently with the powers of the parties, as Counsel may advise."—*Charles E. Stewart*, secretary for the *London and North-Western Company*: *Robert Scott* on behalf of the committee of shareholders. *London*, 10th March 1851.—“Your committee have further to report, to the shareholders, that they have not entered upon the above negotiation, until they had fully advised, with eminent Counsel, upon the validity of the agreements which were submitted to their consideration by the shareholders, and had thereby ascertained that these agreements were not binding or such as could be enforced at law.”—Signed, on behalf of the committee, *Robert Scott*, chairman.

1851.
THE SHREWS-
BURY AND
CHESTER
v.
THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO.

The bill then stated that the last-mentioned supplementary report of the said committee, was submitted to the shareholders of the *Shrewsbury and Birmingham*

1851.

THE SHREWS-
BURY AND
CHESTER

v.
THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO.

Railway Company at the adjourned meeting of the 12th of March 1851, and discussed thereat; and that it would have been adopted had it not been ascertained, by the shareholders, that it could not be legally entertained at the adjourned meeting; and, thereupon, the shareholders resolved that the further consideration of the report of the directors and the consideration of the report of the committee of inquiry, including the supplemental report, and the further business of the ordinary general meeting, should be adjourned until the 4th of April, and that the directors should be and they were thereby requested to call a special general meeting on that day, for the purpose of adopting or refusing the offer of the *London and North-Western Company*, and determining whether so much of a bill in Parliament, proposed by the *Shrewsbury and Chester Company*, as affected the interests of the *Shrewsbury and Birmingham Company or related to an agreement with it, should be opposed or supported*, and to consider and determine upon all measures arising out of the report of the committee of inquiry. The bill next stated that the directors of the *Shrewsbury and Birmingham Company*, had called a special general meeting on the 4th of April, for the purpose of adopting or refusing the offer of the *London and North-Western Company*, meaning thereby the provisional or preliminary agreement signed by *Stewart and Scott*: That the agreement of the 12th of July 1850, was one of the agreements referred to in the said supplementary report; but it was not the fact that the same was invalid or illegal, and that it still continued to be acted on: That, if the provisional or preliminary agreement signed by *Stewart and Scott*, should be carried out, The *London and North-Western Company* would obtain a complete control over the Defendants' lines of railway, and, by means thereof and of their own lines, would prevent

any through traffic from coming, from the south, on, to or over the Plaintiffs' line from *Chester* to *Shrewsbury*, and would put a stop to any through traffic passing over or from the Plaintiffs' line of railway to the south of *Shrewsbury*, to the Plaintiffs' very great loss and damage, as well as to the loss and damage of the public, and the whole through traffic between *London* and *Chester* and the intervening places, would be monopolized by the *London* and North-Western Company and diverted from the Plaintiffs' lines: That the adjourned general meeting, and also the special general meeting of the shareholders of the *Shrewsbury* and *Birmingham* Company, was intended to be and would be held on the 4th of April next; and it was intended to pass a resolution thereat, for the purpose of adopting the provisional or preliminary agreement signed by *Stewart* and *Scott*; and resolutions would be carried to that effect, and the seal of the Company would be affixed to a deed embracing the terms thereof: That the terms of that agreement were a fraud on the agreement with the Plaintiffs, of the 12th of July 1850, and prepared for the purpose of subverting it and depriving the Plaintiffs of the benefit of it; although the Plaintiffs had always acted in conformity therewith, and had come under heavy liabilities on divers contracts for carrying goods, extending, in some cases, over three years, on the faith of it: That the Defendants, unless they were restrained from carrying out the provisional or preliminary agreement, would cease to be carriers, and would make over, to the *London* and North-Western Company, their stock of engines, carriages &c. and all their rights in respect of their lines of railway, and incapacitate themselves from carrying out or acting on their agreement with the Plaintiffs: That the Act of Parliament referred to in the resolution of the adjourned general meeting of the

1851.
 THE SHREWS-
 BURY AND
 CHESTER
 v.
 THE SHREWS-
 BURY AND
 BIRMINGHAM
 RAILWAY CO.

1851.
 THE SHREWS-
 BURY AND
 CHESTER
 v.
 THE SHREWS-
 BURY AND
 BIRMINGHAM
 RAILWAY CO.

Shrewsbury and Birmingham Company, was promoted by the Plaintiffs, and embraced the agreement of July 1850, and was in furtherance of the due performance thereof.

The bill, after charging that the provisional or preliminary agreement signed by *Stewart* and *Scott*, was a concerted attempt to defeat the agreement of July 1850, and that the latter agreement was valid and binding without any Act of Parliament, prayed that it might be declared to be valid and binding as between the parties thereto; and that the Defendants and their directors, and all other persons acting on their behalf or with their authority, might be restrained from entering into or carrying out the intended agreement with the *London* and *North-Western Company*, or any agreement similar thereto or which should cause it to be the interest of the Defendants to fail in, or should prevent or obstruct them in carrying out the purposes of the agreement of July 1850, and from doing or omitting to do, or procuring the doing or omission, either by resolution or otherwise, of any act matter or thing the doing or omission of which was or might be in breach or violation of, or repugnant to or inconsistent with that agreement, or any of the provisions thereof.

Mr. *Bethell*, Mr. *Malins* and Mr. *Giffard*, now moved for the injunction prayed for by the bill.

The *Solicitor-General*, Sir *F. Kelly*, Mr. *Rolt*, Mr. *Follett* and Mr. *Prior* opposed the motion.

Mr. *Stuart* and Mr. *Hardy* appeared for two of the officers of the *Shrewsbury and Birmingham Railway Company*, who were Co-defendants.

The arguments and cases cited are noticed in the judgment.

The VICE-CHANCELLOR, after stating the notice of motion, continued thus :

The material facts of the case are as follows :—The Plaintiffs, the *Shrewsbury and Chester* Railway Company, have a Railway from *Chester* to *Shrewsbury*, opened the whole way. The Defendants, the *Shrewsbury and Birmingham* Railway Company, have a Railway from *Shrewsbury* to *Wolverhampton*, and so on to *Birmingham*—that is, a complete railway to *Wolverhampton* ; and from thence they go, at present, by the line of the *London* and North-Western Railway Company. As the two railways united, and, I believe, had a common terminus at *Shrewsbury*, it became, of course, the common interest of both to provide for what they called the through traffic—that is, traffic from *Chester* to *Wolverhampton* or *Birmingham*, and from places north of *Chester*, coming to *Chester*, and so on to places through *Birmingham* and south of *Birmingham* and beyond *Birmingham*. They did this, or supposed they had done it, by an agreement of the 12th of July 1850, under which each Company was authorized to run their engines and carriages through both lines ; and provisions were made for ascertaining the share of each Company in the amount of toll received in respect of such transit over the two lines. Either Company was to be at liberty to terminate that arrangement by giving three years' notice : but then the Company receiving the notice, was to have liberty, for ever, of using the railway of the other Company on certain stipulated terms, I think, of paying half the toll, or some other arrangement was made, the details of which it is not material for me to go into. This contract was dated in July 1850 ; and it re-

1851.
THE SHREWS-
BURY AND
CHESTER
v.
THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO.
3rd April.

1851 :
 {
 THE SHREWS-
 BURY AND
 CHESTER
 v.
 THE SHREWS-
 BURY AND
 BIRMINGHAM
 RAILWAY CO.

ceived the seals of both Companies : but its terms had, in fact, been acted upon and agreed to, from a time long anterior—namely, from October 1849, and it has continued in operation up to the present time.

It seems that a large part of the shareholders of the *Shrewsbury and Birmingham* Railway Company, have become anxious to get rid of this arrangement, and a special general meeting of the Company has been duly convened, and is to meet to-morrow, the object being to obtain the sanction of the shareholders to an agreement to be entered into between the *Shrewsbury and Birmingham* Company and the *London and North-Western* Company, by which the *Shrewsbury and Birmingham* Company are, in fact, to lease their line to the *London and North-Western* Company for twenty-one years. There was a good deal of transaction between these parties previously to the convening of the special general meeting. I need not advert to those circumstances, because it all ended in the fact that a special general meeting for the purpose of taking this matter into consideration, was duly convened for the 4th of April, and consequently is to take place to-morrow.

The terms of the proposed agreement appear in a paper intituled : “ Supplementary Report of the Committee of Inquiry of the Shareholders of the *Shrewsbury and Birmingham* Company,” and the material terms are these (see *ante*, page 415).

Now, there can be no doubt of the fact that the proposed agreement is an agreement altogether inconsistent with the contract of July 1850. There could no longer be three years’ joint traffic, or, after that time, a perpetual right, in the Plaintiffs, to use the line, if the

contract was entered into ; and the object of the bill is to enforce the former agreement, and to prevent the *Shrewsbury and Birmingham* Company from entering into the proposed contract with the *London and North-Western* Company.

1851.
THE SHREWS-
BURY AND
CHESTER
v.
THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO.

The ground of the Plaintiffs' case is that they are, in fact, seeking the specific performance of a partnership contract ; and there is no doubt that this Court has jurisdiction to prevent one partner from excluding another from, or from so acting as to prevent the continuance of, the partnership according to its terms. If two parties agree to devote their whole time to a partnership concern, this Court will not permit one of them to exclude the other from the partnership, or to set up a separate business which makes it impossible that he should perform his partnership obligation ; and the bill seeking to restrain the violation of such a partnership contract, though it seeks nothing but an injunction, is, in substance, a bill for a specific performance, or at least a bill to be dealt with on principles analogous to those on which the Court acts with regard to specific performance.

Now here the Plaintiffs rest their title to relief upon that principle. Their argument is that the bill shows a partnership contract, or, what is in truth just like a partnership contract, and that it shows an intention not only to violate, but to destroy the subject-matter of it ; and so the bill seeks an injunction to restrain the Defendants from thus violating the contract : in substance it seeks a specific performance of the contract of July 1850.

The Defendants resist this, mainly upon the ground that the alleged partnership contract is invalid in law ;

1851.

THE SHREWS-
BURY AND
CHESTER

v.

THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO,

and being so, they say they have now an opportunity of entering into an agreement with the *London* and North-Western Company which would be very advantageous to them; and that the meeting to be held to-morrow, has been convened for the purpose of obtaining the sanction of the shareholders to that agreement.

The question is, whether I ought to restrain the shareholders at this meeting from sanctioning, and the Company from entering into the proposed agreement, or any agreement of a similar nature. The main drift of the argument addressed to me was directed to the obtaining of an injunction restraining the Defendants, not from doing any acts interfering with the due enjoyment of the rights under the agreement of July 1850, nor to prevent them from excluding the Plaintiffs' carriages from their line while engaged in through traffic, but to restrain them from entering into a contract, the due performance of which will have that effect. And this appears to me to be a most important distinction. The resolution at the meeting to-morrow will not, and the entering into the agreement will not, affect the Plaintiffs; but the acts likely to be sanctioned by the one, and contracted for by the other, will.

I do not mean to say that this Court will not, under some circumstances, prevent parties, pending litigation, from alienating, or even entering into contracts relating to subject-matters of litigation. By such alienations or contracts no eventual injury can, in general, result to the Plaintiff; but they may impose on him the necessity of making additional parties, and may delay and embarrass him in the assertion of his rights. In some cases they might even tend to destroy the subject-matter in dispute; as would clearly have been the case in *Wilson v.*

Wilson (a), which was a suit for the specific performance of an agreement, between husband and wife, for separation, and, pending that suit proceedings were instituted or carried on, in the Ecclesiastical Court, for establishing the restitution of conjugal rights. Of course, if that suit were dismissed, it would do no harm nor affect the case at all; but if once the Ecclesiastical Court had decreed restitution of conjugal rights, that would substantially have put an end to the subject-matter of litigation. Therefore, in that case, the Court interfered. This Court therefore will, where the necessity of the case requires it, interfere by injunction during litigation, not only to preserve property *in statu quo*, but sometimes also to prevent the Defendant from affecting it by contracts or conveyances, or other acts.

But this latter interference is by no means a matter of course; as was stated by Lord *Eldon* in *Spiller v. Spiller* (b). In that case the Defendant, *Spiller*, had contracted to sell to the Plaintiffs certain copyhold property. I believe the contract was a verbal contract, but possession had been taken and a part of the purchase-money paid, and he afterwards became insolvent, or under some obligation to convey all his property to the other Defendants, *Bunscombe* and *Wakeley*, as trustees. The bill was filed, by the purchasers, against the Defendant *Spiller* and those other persons; and it prayed the specific performance of the agreement, and for an injunction restraining the Defendant *Spiller* from surrendering the copyhold premises to the other Defendants. There can be no doubt that, by doing so, he would not, if the Plaintiffs had a right to specific performance, eventually prejudice them; because, *pendente lite*, their rights could not be affected. An injunction, however, was prayed,

1851.
THE SHREWS-
BURY AND
CHESTER
v.
THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO.

(a) 1 House of Lords Cases, 538. (b) 3 Swans. 556.
VOL. I. N. S. G G

1851.

THE SHREWS-
BURY AND
CHESTER

v.

THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO.

and moved for on certificate of bill filed. The *Lord Chancellor* says:—"The Plaintiffs are, under the circumstances, entitled to an injunction." Unfortunately, what the circumstances were we do not know. "But I wish it to be understood as my opinion that, in general, on a bill for the specific performance of an agreement to sell," (just the same principle must apply to that which is *quasi* a specific performance of a partnership contract) —"the Plaintiff is not entitled to restrain the owner from dealing with his property: a different doctrine would operate to control the rights of ownership, although the agreement was such as could not be performed." One sees, at once, the good sense of that. The Court may interfere if the circumstances require it; but it is a monstrous proposition to say: "I will prevent you from exercising a legal right, because somebody else is trying to establish against you an equitable right." Therefore, Lord *Eldon* says, though the Court will do it under certain circumstances, it is by no means a matter of course. In that case, however, he did grant the injunction.

When the Court is called on to interfere to preserve property *pendente lite*, there are, I apprehend, two points on which the Court must satisfy itself. First, it must satisfy itself, not that the Plaintiff has, certainly, a right, but that he has a fair question to raise as to the existence of such a right. That was so stated by Lord *Cottenham* in the case to which such frequent reference was made during the argument, *The Great Western Railway Company v. The Birmingham and Oxford Junction Railway Company* (c). Lord *Cottenham* there, after saying that the Court will, in certain cases, interfere to preserve property *in statu quo* during the pendency of the suit, says: "It is true that no purchaser *pendente*

lite would gain a title ; but it would embarrass the original purchaser in his suit against the vendor, which the Court prevents by its injunction." Then he refers to two or three cases, and, among others, to that of *Spiller v. Spiller*. " It is true (he says) that the Court will not so interfere if it thinks that there is no real question between the parties ; but, seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such a purpose, it is not necessary for the Court to decide upon the merits in favour of the Plaintiff."

Therefore, the first point on which the Court has to be satisfied, is not, as Lord *Cottenham* says, positively that the Plaintiff is right, but that he has a fair question to raise. But I do not understand Lord *Cottenham* as meaning to say that, in every case where there is a *primâ facie* or probable case suggested, the Court will interfere. That I cannot conceive to be the doctrine of the Court. It would be inconsistent with what Lord *Eldon* says, and inconsistent with common sense ; for I conceive that, even where it is made out that there is a point to be decided which the Plaintiff is fairly raising, still there is a further question, namely, whether interim interference, on a balance of convenience and inconvenience to the one party and to the other, is or is not expedient. Where the alternative is interference or probable destruction of the property, there, of course, the Court will be very ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the Defendant. But where, on the other hand, the only evil to result from non-interference, is that the Plaintiff may, by

1851.

THE SHREWS-
BURY AND
CHESTER
v.
THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO.

1851.

THE SHREWS-
BURY AND
CHESTER
v.
THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO.

the contracts or deeds of the Defendant, be retarded or embarrassed in his litigation, there, the Court will be far more ready to listen to any suggestion of the Defendant, showing that interference during litigation will prejudice his rights.

Acting on these views, the first thing I have to satisfy myself of, is whether there is a real question between the parties under the deed of July 1850. *Primá facie*, that deed gives the Plaintiffs a good title. But the question is whether the Defendants have any real ground for disputing its validity. This is the converse of the question argued in the case before Lord *Cottenham*, but I think exactly the same principles apply.

I do not feel myself called on to give an opinion as to whether the contract is a valid contract or not. It is sufficient for me to say that I think there is a question which the Defendants are entitled to raise.

There is another point which has struck me. Suppose it is invalid, query, whether this is not a divisible contract, so that the Court might perform part of it. It is a contract under seal, and there may be a question whether the consideration is not entire and running throughout; and I see a great number of questions that may be raised on this point, satisfying me that it is not a mere pretence to say that there are doubts entertained about the validity of the contract. I cannot say that I am so entirely clear on that, that I can treat the Defendants as being guilty of a sort of fraud or imposition on the Court in pretending that there is a doubt as to its validity.

That being so, I have this before me—a contract sought to be enforced by means of this injunction; but

as to which there is a *bonâ fide* dispute whether it is valid or not.

Then it is said, in that state of things, I ought to be governed by that which occurred in the case of *The Great Western Railway Company v. The Birmingham and Oxford Junction Railway Company*, which, it is said, is precisely the same case. In that case the Defendants had entered into a contract to sell their railway to the Plaintiffs, and the bill was filed for a specific performance of that agreement. And it alleged that the Plaintiffs were obliged to take such proceeding, because the *Birmingham* and *Oxford* Company, contending for the invalidity of their contract with the Great Western Company, were proceeding to enter into a contract to sell to the North-Western Company; and the bill there, as here, prayed that the Defendants might be restrained by injunction from entering into any agreement for the sale of their railway to the *London* and North-Western Railway Company, or from in any manner dealing with such railway or with the property or effects thereof, except with the approbation of the Plaintiffs; and from doing or omitting to do, or procuring the doing or omission of any act, matter or thing, the doing or omission of which was, or might be, in breach or violation of, or repugnant to, or inconsistent with, the said agreement.

It is said the case now before me is precisely the same; and, undoubtedly, I feel that there is a very great resemblance between the two cases. Lord *Cottenham*, in that case, did interfere. Then, what was pressed on me was that I ought to interfere just in the same way, almost (so to say) blindfold. I certainly should be the last to dispute the proposition that, where a matter has been de-

1851.

THE SHREWS-
BURY AND
CHESTER
v.
THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO.

1851.

THE SHREWS-
BURY AND
CHESTER
v.
THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO.

cided by a superior Court, even if I doubted the propriety of the decision, I am bound to follow it. Therefore, if I found this case of *The Great Western Railway Company v. The Birmingham and Oxford Junction Railway Company*, an express authority guiding me, I should feel I was bound to act on it, even if I felt a doubt as to its propriety; but I cannot say that, on full consideration, I do come to that conclusion. In the first place, Lord *Cottenham's* arguments there, are directed to the demurrer. It is true that, on that demurrer being overruled, the injunction that had been granted by the *Vice-Chancellor*, was also established. But, unfortunately, we have none of the arguments that were urged upon the motion for the injunction; nor have we, which is much more material, any of the affidavits which were before the Court. If it is to be assumed, as a matter of course, that because the bill was not demurrable, therefore an injunction was to issue, I should say then I have to decide between what Lord *Eldon* says and what Lord *Cottenham* says. It is quite clear Lord *Eldon* says that that is not the law of the Court: it cannot be: and I come to that conclusion, because, although Mr. *Bethell*, who was Counsel in the case, stated (I have no doubt quite accurately) that the injunction was sustained, yet I very much doubt whether that could mean anything more than this, that the injunction was sustained because there were no circumstances, brought before the Court, putting the propriety of the injunction and the decision on the demurrer at all in conflict the one with the other. Not having the affidavits before me in that case, I do not know what there was to show any countervailing inconvenience that would result from issuing the injunction. Probably there was none; and if so, when it is once determined that there is a bill for the specific performance of an agreement, and that the Defendant is going to enter into a contract that will

embarrass the Plaintiff in his litigation, the first impulse of the Court will be to prevent that. If there was nothing else to hold the hands of the Court, it would be right to do so ; and I must take for granted that, if the injunction went, it was because there was nothing of that sort brought forward. I cannot but suppose that if there had been a conflict on the point, namely, what quantity of inconvenience resulting to the Defendant would induce the Court to hold their hands, that would have been argued, and the affidavits would have been contrasted, and Lord *Cottenham* would have given some opinion on it.

1851.
 THE SHREWS-
 BURY AND
 CHESTER
 v.
 THE SHREWS-
 BURY AND
 BIRMINGHAM
 RAILWAY CO.

Is that the case here? I must say that, so far from that being the case here, I think that, by granting the injunction in the terms in which I am asked to grant it, I might be occasioning to these defendants irreparable injury, to an extent that it is fearful to contemplate. They are proposing to enter into a contract with the *London* and North-Western Company, under which the *London* and North-Western Company bind themselves, as I understand it, to pay to them a sum which amounts to 40,000*l.* or 50,000*l.* a-year, for twenty-one years. Supposing it were to turn out, in the result, if I were to issue this injunction, that the Defendants are right, and that the agreement which the Plaintiffs have entered into, is invalid *in toto*, and therefore there was no legal bar to the Defendants entering into this contract, (and Mr. *Chesshire* has made an affidavit that he believes this contract to be most highly beneficial to the Defendants, and that he believes the *London* and North-Western Company are now ready to enter into it, but that he verily believes that, if it is delayed, they will not be willing to enter into it,) in what predicament would this Court then find

1851.

THE SHREWS-
BURY AND
CHESTER
v.
THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO.

itself, if it should have issued an injunction restraining the Defendants from entering into a contract *ex hypothesi* a valid contract, which there was no legal ground to prevent them from entering into, and then, afterwards, they should be unable to enter into it, and so lose 50,000*l.* a-year for twenty-one years? Therefore, whatever may have been the case of the Great Western Railway Company against the *Birmingham and Oxford* Company, in this case it is obvious that the effect of my injunction will or may be likely to cause enormous injury to all the shareholders in the Company who are the present Defendants.

Now, that is the ground on which I feel myself bound in this case to refuse the injunction. I have explained it shortly, I hope clearly, so that the parties may see the ground upon which I am acting. It is this, that, although I am perfectly satisfied of the authority of this Court to issue an injunction, not merely to restrain parties from doing acts, but also from entering into contracts pending litigation that may embarrass the Plaintiff in his suit, and that the Court is entitled to do so whenever it sees there is a fair ground for litigation raised by the Plaintiff, yet that right of the Court must be guided by a discretion not to exercise it where it sees that, on the balance of convenience and inconvenience between interim interference and non-interim interference, the balance greatly preponderates in favour of the Defendant and against the Plaintiff. Now, here, the injury to the Plaintiffs, in comparison with the injury to the Defendants, is extremely small. The contract between the Plaintiffs and the Defendants may be put an end to in three years. The present rate of through traffic seems to be something like 12,000*l.* a year. Three years would be something like 36,000*l.*, that is on

both lines, so that it would be the half of that. The Plaintiffs would be entitled, if there was no other remedy, to an action for that; and, though it may not be quite easy for them to prove the exact amount they lose, yet that is a matter not altogether incapable of being estimated: and, on the whole, if the convenience and the inconvenience are weighed against each other, the inconvenience seems to me to preponderate, beyond all measure, in favour of the party who has the legal right to enter into any legal contract he pleases. That is the short ground on which I feel myself bound to refuse the injunction.

1851.
 THE SHREWS-
 BURY AND
 CHESTER
 v.
 THE SHREWS-
 BURY AND
 BIRMINGHAM
 RAILWAY Co.

I think it is necessary for me to add that I had some little doubt whether I ought not to issue an injunction in the terms of the last part of the notice of motion, in which I am asked to restrain the party: "from doing, or omitting to do, or procuring the doing or omission, either by resolution or otherwise, of any act, matter or thing, the doing or omission of which is, or may be, in breach or violation of, or repugnant to, or inconsistent with the agreement of July 1850." But, on full consideration, I do not think I ought. My decision refusing this injunction, does not at all prejudice the question whether, if the proposed agreement, or any similar agreement, should be entered into, the Plaintiffs may not be entitled to an injunction restraining the Defendants, or rather, in that case, restraining the North-Western Company from so acting under that agreement as to exclude them from the *Shrewsbury* and *Birmingham* line or from conducting the through traffic according to the terms of the agreement of July 1850. My refusing this injunction does not at all prejudice that question; and I think I should very much embarrass the case if I were to grant an injunction on that which, in

1851.

THE SHREWS-
BURY AND
CHESTER
v.
THE SHREWS-
BURY AND
BIRMINGHAM
RAILWAY CO.

truth, was not the point argued before me. The point mainly, almost entirely, argued before me, was as to the holding of this meeting and entering into the contract. I think I ought not to embarrass it for two reasons. In the first place I think I ought not to interfere to restrain parties, not from doing anything which they at present are going to do, but which it is supposed they will, under a contract which they will enter into, authorize other persons to do. I think that would be an unnecessary anticipation of an evil that never may happen. I cannot tell that the meeting may sanction this agreement, or that it will be entered into. I cannot tell that it may not be so modified as to secure, to all parties, the rights they may have under the agreement of July 1850; and, after all, the parties to be restrained in such a case, namely, the *London* and North-Western Company would have to be made parties by supplemental bill, or in some other way.

Therefore, on the ground I have stated, namely, the enormous preponderance of inconvenience in granting the injunction over any possible inconvenience in refusing it, I shall refuse the injunction, but I shall make no order as to costs.

IN THE WINDING-UP OF THE DIRECT
BIRMINGHAM, OXFORD, READING AND
BRIGHTON RAILWAY COMPANY.

HUNTER'S CASE.

MR. *HUNTER'S* name had been placed, by the *Master*, on the list of contributories to the above-mentioned Company, which was only provisionally registered; and the *Vice-Chancellor*, on appeal, held that it had been properly so placed, on the authority of *Upfill's case* (a). The official manager not having received any money on account of the Company, and having incurred expenses in winding it up, and the Court having ordered him to pay costs out of the estate, in several cases in which persons whose names had been placed on the list of contributories, had appealed to the Court, (which expenses and costs amounted to 2063*l.*) the *Master* ordered 800*l.*, towards payment of that amount, to be raised by a call of 12*s.* 6*d.* *per share* on Mr. *Hunter* (who held one hundred shares) and on the other contributories whose names were on the list.

Mr. *Rolt* and Mr. *Shapter* now moved that the order might be discharged as to Mr. *Hunter*, on the ground that he had not been ascertained to have incurred any liability whatever as a member of the Company.

Mr. *Roxburgh* (Mr. *Bethell* was with him) appeared for the official manager. In the course of the argument,

shares, to the costs of winding up the Company : *semble*.

1851.
5th June.
*Joint-stock
companies
winding-up
Acts.
Contributory.
Costs.*

No order ought to be made for a call upon the contributories of a provisionally registered Company, on account of the costs of winding up the Company, until the liabilities of the contributories have been ascertained, or at least till the *Master* has ascertained the liability of the contributories to the costs in respect of which the call is made.

The contributories of a provisionally registered Company, are not liable, *in proportion to the number of their*

(a) 2 House of Lords Cases, 674.

1851.
 HUNTER'S
 CASE.

Ex parte Price and Evans in the winding-up of the Rugby, Warwick and Worcester Railway Company, a case recently decided by Vice-Chancellor *Knight Bruce*, was cited.

The VICE-CHANCELLOR, without hearing the reply, said:

I am of opinion that, before the *Master* can, in the exercise of his discretion, make a call for costs, he must have ascertained that the sum for which he is making the call, is costs for which, in the distribution of the costs among the different parties, the persons on whom the call is made, are liable. It does not at all follow, because 2063*l.* have been incurred for costs, that 800*l.* is a proportion in respect of which this gentleman may have to contribute. It is not necessary for me to say more than that, at the present moment, because the *Master* has only said that there certainly will be 800*l.* of costs, and he has made a call to raise that sum. But I very much doubt whether any call for costs, can, according to the true construction of the Act of Parliament, be made till the amount of the debts to which each party is liable, has been ascertained: because, though the *Master* is to make a call not only for the debts of the Company but also for the costs, yet he is to make the call, in respect of the costs as well as the debts, so far only as the contributories shall be liable, at law or in equity, to pay the same. The Winding-up Act of 1848, which makes the contributories subject to these costs, enacts that the general costs of winding up the estate, and the costs of proving debts and trying issues, and of all other matters in which creditors or any particular contributories or classes of contributories or alleged contri-

butories of such Company, shall be interested, shall be at the discretion of the Master (a). Surely it is one ingredient in the exercise of that discretion that the *Master* should find that Mr. *Hunter* belongs to a class the whole of which is liable, together, to a call of some given amount, be it 5*l.* or be it 5000*l.* Surely the *Master* has not proper *data* on which to exercise his discretion, until he has ascertained those facts.

1851.
HUNTER'S
CASE.

An official manager who has to wind up the affairs of an association, (erroneously called a Company,) consisting of thirty or forty individuals each liable to different debts, has a most onerous task to perform. It will be very difficult for him to get any costs until the whole of the liabilities has been ascertained and apportioned. Till the apportionment has been made, it will be very difficult for the *Master* to make any contributory or class of contributories, liable to any particular amount of costs. It seems to me that the *Master* must first ascertain, accurately, what each party is liable to, or, at all events, that the party belongs to a class in respect of which a given portion of costs is, clearly, to be apportioned. Till that is done, I do not think that he can make any call for costs upon any of the contributories.

I must add, further, that it is a problem unsolvable by me, why a man is liable to more costs because he has agreed to take one hundred shares than if he has agreed to take fifty. These are not costs incurred in respect of a formed Company. These are costs incurred, because the taking of shares coupled with the fact of the shareholder being a provisional committeeman, was considered, by the House of Lords, to amount to an authority,

(a) See 11 & 12 Vict. c. 45, sect. 103.

1851.
HUNTER'S
CASE.

given by the party taking the shares, to incur costs on his account. If that be the principle, I do not see why the taking of one hundred shares creates a liability beyond that which arises from taking fifty. You make the parties your agents for incurring the actual costs, which, after that authority, are incurred by the provisional committee.—This however is a speculation which I need not enter into in the present case. The ground on which I rest my judgment is that, till it is ascertained that these costs have been incurred in respect of some liability which attaches on this gentleman personally, or upon a class of contributories of which he is a member, no order can be made for a call for costs, any more than for any other contribution.

I suspect that, if official managers had, some year or two ago, understood, distinctly, what I take to be the law now, they would not have been very ready to incur the responsibility which attaches to their office.

It does not appear to me that the case before Vice-Chancellor *Knight Bruce*, at all governs this: because, there, the *Master* had ascertained, as I collect, that the parties came within a particular class of contributories, namely, parties who had been receiving sums of money back in respect of their scrip; and that seems to me to have been an ingredient that mainly influenced the mind of Vice-Chancellor *Knight Bruce*, and that probably might have made the order quite right.

Order discharged with costs to be paid by the official manager.

DEEKS v. STANHOPE.

DEEKS v. BEBB.

THE bill in the original suit, was filed in December 1842, by some of the shareholders on behalf of themselves and all the other shareholders of the *Marylebone* Joint-stock Banking Company, except the Defendants, who were the directors of the Company. That bill was amended three times in 1843, and a fourth time in 1844, under an order of the 12th of March in that year.

In March 1848, the Plaintiffs filed a supplemental bill for the purpose of bringing the assignees of the Defendant *Maclean*, (who had become a bankrupt,) before the Court.

In December 1848, an order was made under the Winding-up Act of that year, by Vice-Chancellor *Knight Bruce*, on two petitions, (one of which was presented by the Defendant *Walker*,) by which the Company was ordered to be dissolved, and Master *Kindersley* was directed to wind up its affairs: see 1 De Gex & Smale, 585: and that order was affirmed by Lord *Cottenham*, C. See 1 Hall & Twells, 100.

In April 1849, the Defendant, *Walker*, moved to dismiss the original bill for want of prosecution. On the hearing of that motion, the Court gave the Plaintiffs leave to amend the bill a fifth time; which they did in June following. The bill, as amended for the fifth and

1851:
12th June.

Staying proceedings in a suit.
Joint-stock companies winding-up Act.

Pending a suit by the shareholders against the directors of a joint-stock Company, one of the Defendants obtained an order under the 11th and 12th Vict. c. 45, for winding up the affairs of the Company. Some time afterwards, the Plaintiffs moved that all further proceedings in the suit, might be stayed, until the affairs of the Company had been wound up under the order.

The Court refused the motion with costs.

1851.

DEEKS

v.

STANHOPE.

last time, prayed for an account of all sums received by the directors, or by, with or under their order, privity, sanction or authority, for or in respect or on account of the Company, or which, but for their wilful default or neglect, might have been so received; and of all sums properly expended by them, or by their direction or authority, in respect or on account of the Company; and of all bills discounted and advances, by the Company, on which any losses had been sustained, with all the particulars relating thereto; and, in particular, of all bills discounted for and advances made to the directors and to their relations and friends, or any person or persons by their direction or procurement, and on what (if any) securities; and that the *Master* might inquire and state what losses had been sustained, by the Company, in respect or by reason of such bills and advances; and might take an account of all losses sustained by the Company, since it commenced business, and might inquire into and state the particulars of such losses, and how the same were occasioned, and all special circumstances relating thereto: and that the *Master* might take an account of all the dealings and transactions of the directors in regard to the Company, not comprised in the foregoing accounts and inquiries, and might inquire into and state all special circumstances, in regard to such dealings and transactions, as the nature thereof or the justice of the case might require: and that all such declarations might be made and directions given in regard to the management and conduct of the directors and in regard to the accounts and inquiries aforesaid, as the justice of the case might require: and that such of the directors as were living and solvent, might be declared, personally, and the estates of such of them as were dead or had become bankrupt or insolvent, might be declared to be liable to make good all that

might be found due to, and the losses sustained by the Company, in taking the accounts and making the inquiries aforesaid : and that what should be found due, might be ordered to be paid and applied, for the benefit of the shareholders, in such manner as the Court should think fit : and that all other necessary declarations and directions might be made and given for the purpose of affording the Plaintiffs effectual relief against the Defendants in respect of the matters aforesaid : and that the executor of the deceased director, might admit assets of the deceased &c. &c. and that what might be found due from the estates of the bankrupt and insolvent directors, might be proved against their estates ; and that, in the mean time, their assignees, might be restrained from making or paying any dividend out of their estates : and that the *Master* might take an account of all the debts and liabilities (if any) owing by the Company : and that certain promissory notes which were alleged to have been improperly obtained from three of the Plaintiffs, and on which the Defendant, *Richards*,* was suing them, might be delivered up to be cancelled : and that all such other declarations might be made and directions given, and decree made as the circumstances and justice of the case might require : and that, in the mean time, the directors might be restrained from suing for, receiving or getting in the assets of the Company, and from further acting in the affairs thereof, or intermeddling with the property, securities or assets thereof : and that *Richards* might be restrained from further proceeding in the actions which he had brought on the

1851.
 DEEKS
 v.
 STANHOPE.

* *Richards* was not, and never had been a member of the Company. The bill alleged that he gave no consideration for the notes, and that they had been placed in his hands, for the purpose of his suing the makers thereof.

1851.

DEEKS

v.

STANHOPE.

promissory notes : and that a receiver of the outstanding effects and credits of the Company might be appointed.

The answer, of the Defendant *Walker*, to the bill as lastly amended, was filed in August 1849. The Plaintiffs excepted to it, and, it having been found insufficient, *Walker* put in a further answer in February 1850. The Plaintiffs referred back that answer on the old exceptions ; and the *Master* having found it to be still insufficient, *Walker* put in a further answer in April 1850. The answers of all the other Defendants, were filed before that time ; but no further proceedings had been taken in the Cause.

The supplemental bill was amended, under an order obtained in December 1849, by making *Walker* a Defendant to it, in respect of certain alleged fraudulent transactions between him and *Maclean*, which the Plaintiffs said they had discovered in the course of the proceedings, before the *Master*, under the winding-up order. *Walker* demurred to the amended supplemental bill ; and, in January 1850, the late *Vice-Chancellor of England* allowed the demurrer. The Plaintiffs appealed from the order allowing the demurrer ; and the appeal was pending before the *Lord Chancellor*, when a motion was made, on behalf of the Plaintiffs, that all further proceedings in the Causes might be stayed until after the affairs of the Company should have been fully wound up under the winding-up order ; and that, on the proceedings under that order being completed, or at such other time as the Court should think fit, any of the parties might be at liberty to apply, to the Court, touching the costs of the suit or otherwise, as they might be advised ; or that such other order might be made, as to the conduct of the Causes, pending the pro-

ceedings under the winding-up order, as should be just. The Plaintiffs' solicitor made an affidavit in support of the motion, stating that the *Master* was proceeding, under the order, to wind up the affairs of the Company, but that the list of contributories was not finally settled: that, in January 1850 and March 1851, *Walker* carried accounts, into the *Master's* office, claiming large sums to be due, to him, from the Company; but the correctness of those accounts had not been inquired into; that the deponent verily believed that, in proceeding under the order, the various questions raised by the Plaintiffs, would, necessarily, come under the *Master's* consideration, and be adjudicated upon; and that it was an unnecessary expense, to all parties, that the Causes should be further proceeded with, until after the *Master* should have made his report under the order; and that, in the event of the proceedings in the Causes not being stayed, it would be necessary to go into evidence therein, and to prove, over again, the greater part of the matters which had been and would be proved, before the *Master*, under the order; and that, in the proceedings under the order, every matter raised by the pleadings in the suits, would be decided by the *Master*.—*Walker's* solicitor made an affidavit in opposition to the motion, stating, amongst other things, that he believed that it was necessary, before the taking of *Walker's* account in the *Master's* office could be completed and the balance ultimately payable to him, ascertained, that the questions raised in the Causes, so far as it was sought, therein, to charge him, should be finally disposed of; and that, if the Plaintiffs' application to stay proceedings in the Causes, should be granted, the effect would be that, when the balance due to *Walker* was ascertained by the *Master* under the winding-up order, *Walker* would be delayed and prevented from receiving the same, by reason of the ques-

1851.
DEEKS
v.
STANHOPE.

1851.

DEEKS

v.

STANHOPE.

tions and demands raised in the suits having still to be determined and the amount of his liability (if any) in respect of such questions and demands remaining undetermined; and that the *Master* would postpone making any call upon the shareholders for payment of what was due to *Walker*, until such questions and demands should have been determined by the Court, one way or the other, or until the suit should be dismissed.

Mr. *Bethell*, Mr. *Rolt*, and Mr. *Glasse*, in support of the motion referred to the 29th, 50th, 52nd, 53rd, 56th, 57th, 58th and 60th sections of the Act of 1848, and said that the winding-up order was a decretal order, made under a statute, which superseded the necessity of the pending suits: indeed, that it was more comprehensive and efficacious than any decree that the Court could make; and the *Master* could dispose of every question in the suits, and at much less expense, but he could not dispose of the costs; and, therefore, an order ought to be made in the terms of the notice of motion.

Mr. *Stuart*, and Mr. *Cole*, for Mr. *Walker* and certain other parties, said:

If the suits have become unnecessary, the Plaintiffs ought to have moved, not that the proceedings might be stayed, but that the bills might be dismissed. If the winding-up order is more comprehensive and efficacious than any decree that the Court can make in the suits, why did the Plaintiffs oppose the petitions for that order, and, when it had been made, apply to discharge it? Why did they, afterwards, oppose our motion to dismiss their original bill, and obtain leave to amend it and compel us to answer the amendments? Why too, did they make our client a party to their supplemental bill, and

1851.
DEEKS
v.
STANHOPE.

appeal from the order allowing his demurrer to it? The Plaintiffs' present application, is not only inconsistent with their previous conduct, but repugnant to the 58th section of the Act (*a*), and to what Lord *Cottenham* said in his judgment on the motion to discharge the order (*b*). Besides, the *Master* has not jurisdiction, under the order, to decide all the questions in the suits. *Richards* is not a contributory, nor even a member of the Company: what jurisdiction then has the *Master* over him? What jurisdiction has the *Master* to order the promissory notes to be delivered up; or to make some of the directors responsible for the wilful neglect or default of their co-directors; or to restrain the assignees of the bankrupt directors, from making any dividends out of their estates?

The learned Counsel, then referred to the 50th, 53rd and 60th sections of the Act, as showing that the Legislature did not consider that the winding-up order rendered suits respecting the affairs of a Company, unnecessary: and they cited *Underwood v. Jee* (*c*).

Mr. *Southgate*, for the Defendant *Stanhope*, said that his client ceased to be a director and to have any connection with the Company, in 1838: that the bill contained charges of fraud against him, which he denied, by his answer; and that he was entitled to have those

(*a*) That section enacts that except as was expressly provided by the Act, nothing therein contained, nor any petition or order under the same, for the dissolution and winding-up, or for the winding-up of any Company, shall alter

or affect any actions, suits or other proceedings pending at the date of such petition.

(*b*) See 1 Hall & Twells, 103.

(*c*) 1 Hall & Twells, 379; and 1 Macn. & Gord. 276.

1851.

DEEKS

v.

STANHOPE.

charges disposed of, and to be paid the costs occasioned by them: *Stagg v. Knowles* (d). He added that the object of the winding-up order, was to make the shareholders pay their shares of the losses sustained by the Company; and that the object of the suits was to prevent it.

Mr. *Rolt*, in reply, cited *Parbury v. Chadwick* (e) and referred to the judgment in *Lord Mansfield's case* (f).

The VICE-CHANCELLOR :

I am clearly of opinion that this is an improper application, and one that I cannot listen to.

The suit was instituted by some of the shareholders on behalf of themselves and the other shareholders in the *Marylebone* bank, against some persons who were directors at the time of the filing of the bill, and some, who though not then directors, had been so previously : and the object was to wind up the affairs of the Company, and also to charge the Defendants, personally, with a great deal of misconduct and personal liability in respect of the mode in which they had managed the bank. I do not think that the circumstance that some of the Defendants have ceased to be directors, materially affects the case. The suit was instituted so long ago as 1842. Sometime afterwards, a supplemental bill was filed, and answers have been put in to it as well as to the original bill ; and great expense has been incurred and great delay has resulted. In the year 1848, just six years after the original bill was filed, an order was made, under the then recently passed Winding-up Act, to wind up the affairs of

(d) 3 Hare 241.

(e) 12 Beav. 614.

(f) 1 Hall & Twells, 596.

the Company : and now what is sought, on the part of the Plaintiffs observe, is to stay all the proceedings in their suit (which is now in the state that the answers are in, but have not been replied to) until after the affairs of the Company shall have been fully wound up under the winding-up order and that, on such proceeding being completed, or at such other time as the Court shall think fit, (but there is nothing to guide us as to what that other time is to be) any of the parties may be at liberty to apply to the Court touching the costs of the suit. This is asked on a supposed analogy between this case and the case of two suits instituted in this Court for the same purpose, in one of which a decree has been already obtained which will give all the relief that is asked for in the other. On that subject the first observation I must make, is that, according to my experience, the application to stay proceedings in such a case, is the application of the Defendant and not of the Plaintiff. The Defendant says: "Why should I be doubly vexed in this matter? There is a decree which will give you the relief you are asking for in the suit in which you are prosecuting me. I, therefore, ask the Court, in the exercise of a sound discretion, to stay all proceedings: taking care that you have every relief you could have had if you had prosecuted the suit." Undoubtedly such a course of proceeding is very common and quite consistent with justice. But I never heard of such an application as this, where a creditor, having filed a bill, against an executor, alleging that he is a creditor and charging the executor with gross misconduct, some other creditor files a bill and gets a decree. It would be most extraordinary if, in such a case as that, the first creditor could stay all proceedings in his suit; because the executor thus charged with misconduct, might have his whole life dragged out, before the affairs of the

1851.

DEEKS

v.

STANHOPE.

1851.

DEEKS

v.

STANHOPE.

debtor, are wound up. If he is charged with something to which he has made a complete answer, why is the Court to stay the suit at the instance of the party who instituted it, the Defendant objecting, and insisting on the suit going on to a hearing, in order that he may fix the Plaintiff, the author of the unfounded charges, with the costs of it?

Here is a suit instituted for the purpose of winding up the affairs of a Company, (whether the words "winding up" have been struck out is immaterial; that is the object of the suit,) and for the purpose of charging the directors with sums which, but for their wilful default, they might have received, and with other misconduct, and seeking an injunction, among other things, and the delivery up of certain promissory notes, which, the Plaintiffs say, were improperly obtained. Then comes the winding-up order pending that suit and while the Defendants are answering, there being a great number of Defendants, and great delay having taken place in getting in their answers. The winding-up order, it is said, gives all the relief that could be had in the suit; but I very much doubt that. I should have doubted it if there were no authority on the subject; because what is done under the Winding-up Act, seems to me to be indicated, very clearly, by the fourteenth section of the Act, which points out what is to be done. It enacts that it shall be lawful for the Court, on the hearing of any petition for the dissolution and winding-up, or for winding up, either originally or subsequently, or on further directions, to dismiss such petition, with or without costs, or to make an order absolute for the dissolution and winding-up, or for the winding-up of the Company under the provisions of the Act, with or without such special directions as the Court shall think fit; and, by

such order, it shall be referred, to one of the *Masters* of the Court, to wind up the affairs of the Company accordingly, under the provisions of this Act. Now the order in this case, was made without any special directions : and I very much doubt whether it authorizes anything else than what is commonly understood by winding up affairs ; that is, ascertaining what is owed by the Company, and making calls, if necessary, for the payment of what is proved, paying it, and then ascertaining what are the liabilities of the members, *inter se*, and giving the necessary directions with respect to those liabilities. I should very much doubt, independently of authority, if anything else is authorized by such a general order. But I am very much relieved from the necessity of giving my own opinion upon it, because Lord *Cottenham*, in this very case, has said that this bill seeks relief which the Plaintiffs could not have under the winding-up order. Therefore, unless I am to overrule the decision of Lord *Cottenham*, on a matter not only *pari materiâ* to the case before me, but in the very case before me, I am bound to say that this bill seeks relief that the Plaintiffs can not have under the Winding-up Act. Then, what right have I, independently of all other objections, to stay proceedings in that suit which, Lord *Cottenham* says, must necessarily be disposed of before the winding-up takes place. Therefore, on that ground also I must refuse the motion.

But, independently of all this, the parties making this application (which is an application to the discretion of the Court) have so conducted themselves as to render it my duty to refuse it. The winding-up order was obtained in December 1848, and if it be true that all the relief that the suit can give, can be obtained under that order, the Plaintiffs, who had kept the Defendants in Court for six years previously, were bound to come to

1851.
DEEKS
v.
STANHOPE.

1851.

DEEKS

v.

STANHOPE.

the Court promptly, and ask that the proceedings in the suit might be stayed. Instead of that, they amend their bill, force the Defendants to put in a further answer, and except to that answer, (all of which proceedings were unnecessary, if, as they now contend, the winding-up order is more efficacious than the suit,) and they suffer two years and a half to elapse before they ask the Court to stay the proceedings in the suit. After they have so conducted themselves, it seems to me, as a matter of discretion merely, independently of all other objections, that it would be most improper to grant their application: and therefore, on the grounds I have stated, I shall refuse it with costs.

THORNHILL v. MANNING.

THIS was a foreclosure suit. After the final order in it had been *signed and enrolled*, the Defendant served the Plaintiff with a notice of motion that the time fixed, by the decree in the Cause, made by the late *Vice-Chancellor of England*, for payment, by the Defendant to the Plaintiff, of what should be found due to her, for principal, interest, and in respect of insurance and interest in the decree mentioned, and the costs in the decree mentioned, might be enlarged for one month from the time when the order on the motion should be made, or for such other time as the Court should think proper; and that, for the purpose aforesaid, the foreclosure in this Cause might be opened on such terms as the Court might deem expedient; the Defendant being ready and willing and offering to pay, into Court to the credit of this Cause, such an amount as would cover the principal, interest, insurance and costs to which the Plaintiff was or might be entitled, within such time as the Court might direct; and that, in the mean time, the Plaintiff might be restrained from selling or disposing of, charging or encumbering, or, in any manner, dealing or interfering with the mortgaged premises, and from commencing or prosecuting any action of ejectment to recover possession of such part of the premises as were not then in her possession.

1851 :
30th May and
3rd June.

*Mortgagor and
mortgagee.
Foreclosure.
Jurisdiction.*

The time fixed, by the decree in a foreclosure suit, for payment of principal, interest and costs, enlarged by the *Vice-Chancellor*, notwithstanding the decree had been made absolute, and the order absolute had been signed and enrolled.

The decree and the *Master's* report made in pursuance of it, were dated the 7th of June and the 3rd of August 1850, respectively. The principal, interest and costs found due by the *Master*, amounted to 572*4*l.:

1851.
 THORNHILL
 v.
 MANNING.

the day on which that sum ought to have been paid, was the 3rd of February, 1851, which was six months after the date of the report; and, the money not having been paid, the foreclosure was made absolute on the 12th of the same month. The notice of motion was dated on the 11th of April 1851; which was after the order absolute had been signed and enrolled. The motion was supported by affidavits, the material contents of which are stated in the judgment.

Mr. *Bethell* and Mr. *Bilton*, in support of the motion, said that the value of the mortgaged estate was much greater than the sum found due by the *Master*: and they referred to the passages in the affidavits, which are stated in the judgment, and to *Jones v. Creswicke* (a) and the cases stated in the report of that case, and, particularly, to *Nanfan v. Perkins* (b). But they mainly relied on *Ford v. Wastell* (c).

Mr. *Stuart* and Mr. *Terrell*, for the Plaintiff, said that, as the order absolute had been signed and enrolled, it had become the order of the *Lord Chancellor*, and, therefore, the *Vice-Chancellor* had no jurisdiction to vary it; and they referred to Sir *James Wigram's* judgment in *Ford v. Wastell* (d), to show that the application ought to have been made to the *Lord Chancellor*.

The *Vice-Chancellor*.—It is not necessary to vacate the enrolment. The enlargement of the time for payment of principal, interest and costs, leaves the order absolute untouched; and such appears to have been Sir *James Wigram's* impression (e).

(a) 9 Sim. 304.

(c) 2 Phill. 591.

(b) *Ibid.* 308.

(d) 6 Hare, 229.

(e) See 6 Hare, 234.

The VICE-CHANCELLOR, after stating the object of the motion, the dates of the decree, order absolute and notice of motion, and that the notice was served after the enrolment of the order absolute, proceeded thus :

1851.
 THORNHILL
 v.
 MANNING.
 3rd June.

When this motion was made, the Counsel for the Plaintiff objected that, if I enlarged the time for payment of the sum found due to the Plaintiff, I should vary the order absolute ; and, as that order had been signed by the *Lord Chancellor* and enrolled, I had no jurisdiction to alter it. It appears, however, from his Lordship's judgment in *Ford v. Wastell*, that the extension of the time is something collateral to the order, and that the enrolment of the order is no obstacle to the extension : the order remains the same order, notwithstanding the time is extended to a future day. That was the clear opinion of the *Lord Chancellor* ; and I think that it completely answers the objection. Moreover, I have had the advantage of conversing with Sir *James Wigram* upon the subject, and he told me that he distinctly understood *that* to be what the *Lord Chancellor* meant : and he intimated to me, what is evident from the report in 6th Hare, that, when *Ford v. Wastell* was before him, he had very great doubt whether he ought not to make the order ; but he thought it better that the case should go before the *Lord Chancellor*, and that the *Lord Chancellor* should decide it. I think, therefore, that the point of form does not stand in my way.

Then the question is whether, on the merits, I ought to make the order.—This depends on what is the doctrine of the Court with regard to mortgages. They are anomalous cases : the Court, in dealing with them, is governed by rules which are totally different from the rules which govern it in other cases. The contract

1851.
THORNHILL
v.
MANNING.

between a mortgagor and a mortgagee has been treated by this Court, from time immemorial, as being something different from that which it purports to be, namely, as a contract for the repayment of money for which the mortgaged estate is a pledge, which the borrower may redeem notwithstanding the day named in the proviso for redemption, has long passed. That being so, the question is whether I can act upon that principle in the present case, without doing injustice to the mortgagee.

It is quite impossible to lay down any general rule as to the circumstances which will induce the Court to open a decree of foreclosure ; but this I must observe that the Court has a very strong inclination to give assistance to a mortgagor, if he applies promptly and the Court has the means of giving the mortgagee immediate payment : and perhaps that is the only clue which the Court has to guide it. The mortgagor must not lie by and let the mortgagee take possession of the estate and deal with it as if he were to hold it, permanently, as his own ; and, then come and say : “ I am now ready to pay you the principal, interest and costs.” The Court would not then interfere on any terms. I think that the promptness of the mortgagor, is the great and important feature in the case which must guide the Court in deciding as to what it ought to do.

Now what are the facts of this case ? The order of foreclosure absolute, was made on the 12th of February. And I must remark that there had not then been any extension of time. As the mortgagor was endeavouring to raise the money, it would have been, almost, if not quite, a matter of course, to grant him three months further time, if he had come before the 3rd of February, and asked for it ; but which he did not do. It

1851.

THORNHILL
v.
MANNING.

appears, from the affidavit of *Joseph Manning*, the son of the mortgagor, that, on the 23rd of January, which was shortly before the time when, according to the decree, the money was payable, Mr. *Parker*, the solicitor of the mortgagee, said that, if there was no obstacle placed in his way, he would do the best he could for the mortgagor; and that all that Miss *Thornhill*, the mortgagee, wanted, was her money, and that she did not want the estate. That was within a fortnight of the time of payment; and I cannot but think that the mortgagor might reasonably rely on that, as meaning that, if the money was forthcoming, the mortgagee would not look strictly to what her legal rights were. The money, however, was not forthcoming; and the decree was made absolute on the 12th of February. On the 17th of February, Mrs. *Porter*, the daughter of the mortgagor, went to visit Miss *Thornhill*; and Miss *Thornhill* then said that all that she wanted was her money; and that she would write, to Mr. *Parker*, to say so; and that, if the money was taken to Mr. *Parker*, he would not refuse it. Afterwards Mr. *Parker* said that, if the Defendant would bring the money to him, he should have the estate. Therefore it is clear that all parties treated the estate as being merely a security. Then, on the 22nd of March, Mr. *Parker* told *Joseph Manning*, the son, that his instructions, from Miss *Thornhill*, were to sell the estate; for she did not want the property, but her money; and that what was remaining after payment of all principal, interest and costs, would be given to, Mr. *Manning*, and that would be 3000*l*. Therefore it is quite clear that, according to Mr. *Parker's* estimate, the value of the estate was much greater than the money due to Miss *Thornhill*. Then, on the 9th of April, the money was actually tendered to Mr. *Parker*; but he refused to ac-

1851.

THORNHILL

v.

MANNING.

cept it: and, two days afterwards, the notice of this motion was served.

I am of opinion that, applying the principles of this Court to such a case as this, it is quite out of the question to say that the mortgagee is entitled to keep the estate, or that it is to be treated otherwise than as a pledge. Consequently I think that the mortgagor is entitled to the relief which he asks by his motion: but it must be granted to him on these terms: On payment, to the Plaintiff, on or before the 10th of June instant, at Mr. *Parker's* office, between the hours of eleven and twelve, of the sum reported due, let the proceedings in the ejectment commenced by the mortgagee, be stayed, and let the time fixed by the decree, be enlarged for a month after the *Master* shall have made his report on the reference hereinafter directed. Refer it, to the *Master*, to compute subsequent interest and to tax subsequent costs, including the costs of the ejectment (because I think that the mortgagee had a perfect right, after the decree was made absolute, to deal with the estate as her property), and including also the costs of redeeming the land tax (I do not know that that would be allowed to a mortgagee, but she had a right to treat herself as the owner) and including all money *bonâ fide* expended on the faith of the order of the 12th of February 1851: And refer it, to the *Master*, to take an account of the rents received, by the mortgagee, since the date of his report of the 3rd of August 1850: and, on payment of what shall be found due to the mortgagee, let her re-convey the estate to the mortgagor, the re-conveyance to be settled by the *Master* if the parties differ, and to be subject to any contracts for leases &c. which the mortgagee may have entered into on the faith of the order absolute.

NEWMAN v. WARNER.

THIS was a suit for specific performance, by the vendors of a farm, part of the estates comprised in a marriage settlement dated in 1817.

1851 :
28th June.

Power.
Trustees.
Title.

*Vendor and
purchaser.*

The settlement, after limiting the estates to the use of the wife for life; to the use of *W. Wickens* and *J. Clapton* and their heirs during her life, in trust to preserve contingent remainders; to the use of the husband for life; to the use of the same trustees and their heirs for the same purpose, during his life; to the use of the children of the marriage in tail; and to the use of the wife's right heirs, declared that, notwithstanding the uses, limitations and trusts therein contained, it should be lawful for *Wickens* and *Clapton*, and the survivor of them, and the executors and administrators of such survivor, at the request and by the direction of the husband and wife, or of the survivor of them, such request to be testified in writing under their, his or her hands and seals or hand and seal, attested by two or more credible witnesses, to sell, and, thereupon, to appoint by way of conveyance, either for money or in exchange,* the settled estates, or any part thereof, and the fee simple and inheritance thereof, to any person or persons, either together or in parcels, for such price or prices in money, or for such other freehold hereditaments in England as to them, the said trustees, with such consent as aforesaid, should seem reasonable and proper; and that, upon payment of the money arising by such sale or sales respectively, when any part or parts

A power of sale in a settlement, was given to *A.* and *B.*, the trustees to preserve contingent remainders, and the survivor of them and the executors and administrators of the survivor: Held that trustees appointed by the Court in the place of *A.* and *B.* could not exercise the power.

* *Sic.*

1851.

NEWMAN

v.

WARNER.

of the settled tenements should be sold for a valuable consideration in money, it should be lawful *for the trustees or trustee for the time being*, to sign and give proper receipts for the monies for which the same should be sold, *which receipt or receipts of the said W. Wickens and John Clapton or the survivor of them or the executors or administrators of such survivor*, should be a sufficient discharge and discharges, to such purchaser or purchasers, for the purchase-money which, in every such receipt, should be acknowledged or expressed to be received, and that such purchaser or purchasers, or any of them, their or any of their heirs, executors, administrators or assigns, should not, afterwards, be obliged to see to the application, or be answerable or accountable for any loss, misapplication or non-application of such purchase-money so received, or any part thereof. The settlement contained no power to appoint new trustees. In 1847, at which time *Clapton* was dead and *Wickens* was resident abroad, a suit was instituted by the wife, against her husband and children, for the appointment of new trustees of the settlement: and on the hearing of that suit for further directions and of a petition presented under the 11 Geo. IV. & 1 Will. IV., c. 60, an order was made, in obedience to which the settled estates were conveyed by a gentleman named *Hallett*, who had been appointed by the Court for that purpose, unto and to the use of the Plaintiffs, their heirs and assigns, *for and during all the estates and interests of Wickens in the same, under or by virtue of the settlement*, upon and for the trusts, intents and purposes *and with under and subject to the powers, provisoes, declarations and agreements declared and contained, concerning the same, in and by the settlement*, or such of them as were then subsisting and capable of taking effect. Shortly afterwards, the plaintiffs agreed to sell the farm to the Defendant.

The question, which was raised by an exception taken by the Plaintiffs to the *Master's* report disapproving of the title to the farm, was whether the power of sale in the settlement, was exercisable by the Plaintiffs.

1851.
NEWMAN
v.
WARNER.

Mr. *Stuart* and Mr. *Chichester*, for the Plaintiffs, relied on *Drayson v. Pocock (a)* and on the power of sale not being exercisable without the consent of the husband and wife.

The *Vice-Chancellor*.—In *Drayson v. Pocock* the legal estate in fee was vested in the trustees, and the only question was whether they could give a good discharge for the purchase-money.

Mr. *Bethell*, for the Defendant, said that where, as was the case in *Drayson v. Pocock*, the legal estate could be transferred and the Court had to deal only with an equity, the decree or order of the Court would bind the equitable interest and so secure the purchaser ; but, in the present case, the Plaintiffs could not transfer the legal estate ; for the power of sale was given to the original trustees of the settlement and the survivor of them and the executors or administrators of the survivor, and as the Plaintiffs did not fill any one of those characters, they could not exercise the power. He referred to *Townsend v. Wilson (b)*, in order to show how strictly powers of sale were construed ; and to Lord *Eldon's* observations on that case in *Hall v. Dewes (c)*, and also to *Bradford v. Belfield (d)*.

Mr. *Rudall*, with Mr. *Bethell*, said that the present

(a) 4 Sim. 283.

(c) Jacob, 189 ; see 193.

(b) 1 Barn. & Ald. 608.

(d) 2 Sim. 264.

1851.

NEWMAN
v.
WARNER.

case was not a case of trust, but of a purely legal power, collateral to the estates created by the settlement, the exercise of which would divest the estates created by the settlement; and therefore, *Drayson v. Pocock* had no application; besides that that case was overruled by *Cooke v. Crawford* (e) and *Mortimer v. Ireland* (f), which last case was affirmed by the *Lord Chancellor*: that the Court had no authority to vest, in the trustees appointed by it, any of the powers which the authors of the settlement had given to the trustees appointed by them: that the trustees were not trustees in fee, but only trustees to preserve contingent remainders during the lives of the husband and wife; and that the power was neither annexed to their estate nor incident to their office; that trustees appointed by the Court, did not come in under the instrument of which they were appointed trustees; and that it was the universal opinion of the profession that trustees appointed by the Court, could not exercise any of the discretionary powers given, by the instrument, to the trustees thereby appointed: *Cole v. Wade* (g), in which the observations made by Sir *W. Grant*, M. R., were directly applicable to the present case: *Fordyce v. Bridges* (h), and *Oglander v. Oglander* (i).

Mr. *Stuart*, in reply, said that the exercise of the power was not left to the discretion of the Plaintiffs; for it was not to be exercised by them except at the request and by the direction of the husband and wife; and that the effect of the decree in the suit in which they were appointed

(e) 13 Sim. 91.

(f) 6 Hare, 196.

(g) 16 Ves. 27; see 44.

(h) 2 Phill. 497.

(i) 2 De Gex & Smale, 381.

See also *Bowles v. Weeks*, 14

Sim. 591.

trustees, was to substitute them for the original trustees, in every respect.

The VICE-CHANCELLOR :

If I felt any doubt upon the question in this case, I should take time to consider it : but I do not entertain any doubt at all upon it. What the object of the parties to the settlement was in procuring new trustees to be appointed, does not appear. Probably they thought that the new trustees would be able to exercise the power of sale : but, in that, they were mistaken.

The Court of Chancery has, no doubt, jurisdiction to appoint new trustees of an instrument, where a proper case for the exercise of that jurisdiction, is made out ; and parties dealing with them, and paying them money, will be perfectly safe. But, here, the question is what power the Court has to alter the effect of a settlement made under the Statute of Uses. I am of opinion that the Court has no such power. It may appoint new trustees ; and, under the 11 Geo. IV. & 1 Will. IV. c. 60, it may appoint any person it thinks proper to transfer the estates to them ; and his deed will have the same effect as a deed executed by the trustees would have had : but it will not transfer the power ; for the trustees themselves could not have transferred it.

When the settlement was executed, the estates were to go, in a course of legal devolution under the Statute of Uses, to certain persons for life, and to others in tail, in succession : and the question is how can that be got rid of ? Why by nothing but a stipulation, by the parties themselves who made the settlement, that there should be a power to get rid of the uses. The getting rid of them, is an act in derogation of what was done before ;

1851.

NEWMAN

v.

WARNER.

1851.

NEWMAN

v.

WARNER.

and a power for such a purpose, must be always strictly pursued.

Here the power was given to *A.* and *B.* and the survivor of them and the executors and administrators of such survivor: and that power is now attempted to be exercised, not by *A.* and *B.* or the survivor of them or the executors or administrators of the survivor, but by persons to whom the survivor has transferred the estates—transferred them, it is true, under the sanction of the Court; and, therefore, the parties claiming under the settlement, cannot find fault with him for what he has done. But does that give to the parties to whom the property has been transferred, a power which the parties to the settlement did not stipulate that they should have? My opinion is that, according to all the authorities, it did not. Nothing can be so strong as the case of *Townsend v. Wilson*. And, even supposing that case to have been wrongly decided by the Court of Queen's Bench, still it is a complete authority, for this case: for, if it was wrongly decided, it was because, as Lord *Eldon* considered, there were circumstances in it which enabled the Court to say that the persons who did execute the power, were persons who were authorized, by the settlement, to execute it. In that case there were, originally, three trustees of the settlement; and a power of sale was given to them and their heirs. One of them died, and the other two executed the power. The Court of Queen's Bench held that the power was not well executed. But, as the next clause in the settlement declared that the monies to arise from the sale, should be paid to the three trustees or the survivor or survivors of them, Lord *Eldon* thought that, taking the two clauses together, the two surviving trustees might have executed the power. Whether the Court of Queen's Bench was right, or whether Lord

Eldon was right is quite immaterial so far as the present case is concerned: both opinions were founded on the same principle; and that principle applies to the present case. The Court of Q. B. thought that the surviving trustees were not designated, by the settlement, as persons to execute the power; Lord *Eldon* thought that they were. But neither the one nor the other thought that the power could be exercised by any one except a person contemplated by the settlement. But it is impossible to say that persons appointed trustees of a settlement under an order of the Court of Chancery, are persons contemplated by a settlement which says that a power shall be exercised by the persons who are appointed trustees by it, and the survivor of them, and the executors and administrators of such survivor.

1851.
NEWMAN
v.
WARNER.

Therefore, upon the principle established by *Townsend v. Wilson*, (whether that case was rightly decided, or ought to have been decided as Lord *Eldon* thought,) and without going into the other authorities, I hold, not only that the Plaintiffs cannot make such a title as a purchaser is bound to accept, but that the *Master* is right in the conclusion which he has come to, namely, that the Plaintiffs cannot make any title at all to the farm which they have agreed to sell to the Defendant: and, consequently, I shall overrule the exception taken by them to the *Master's* report, with costs.

Exception overruled with costs.

EGERTON v. LORD BROWNLOW.

1851 :

30th June, 2nd,
4th, 12th and
14th July and
20th August.

Will.
Condition.

John William Earl of Bridgewater devised his freehold estates to trustees, in trust to convey them to the use of Lord *Alford*, his great nephew, for ninety-nine years if he should so long live; remainder to trustees and their heirs during the life of Lord *Alford*, in trust to preserve contingent remainders: remainder to the use

of the heirs male of the body of Lord *Alford* with divers remainders over: provided that, if Lord *Alford* should die not having acquired the title of Duke or Marquis of *Bridgewater*, the estate directed to be limited to the heirs male of his body, should cease, and the estates should, thereupon, go over and be enjoyed according to the subsequent uses and limitations directed by his will.

Lord *Alford* died leaving a son, but without having acquired the title.

Held that the proviso was valid.

JOHN WILLIAM seventh Earl of *Bridgewater*, by his will dated the 31st of March 1823, after charging his estates in *Shropshire* and *Cheshire* with an annuity of 12,000*l.* to his wife *Charlotte Catherine Anne* Countess of *Bridgewater*, and with annuities of 4000*l.* each to Sir *Charles* and Lady *Long* his niece, gave all his real estates, except his copyhold and leasehold estates thereafter devised and the estates of which he was either a trustee or a mortgagee, and subject, as to his estates in the counties of *Salop* and *Chester*, to the before-mentioned annuities and to the powers for the recovery thereof, "Unto and to the use of *John Earl Brownlow*, *Edward Herbert* Lord Viscount *Clive*, and the said Sir *Charles Long*, their heirs and assigns for ever, upon trust, by such conveyances or assurances as shall be deemed expedient or counsel shall advise, to convey and assure, settle and limit all my said hereditaments and real estate hereinbefore devised, with their appurtenances, to the several uses, upon the trusts, and for the intents and purposes, and with, under and subject to the powers, provisoes, limitations and declarations hereinafter by this my will declared and directed

concerning the same: And in the mean time to permit and suffer my said hereditaments and real estates to be held and enjoyed by, or to pay, apply and dispose of the rents, issues and profits thereof unto or for the benefit of such person or persons, or for such intents and purposes as the same would go or belong to or be applicable if such settlement had been actually made pursuant to this my will: And I will and direct that such conveyance and settlement shall be to the use of the heirs of my body: remainder to the use of the said *John Earl Brownlow, Edward Herbert Lord Viscount Clive* and Sir *Charles Long*, their executors, administrators and assigns, for and during the term of ninety years, computed from the day next before the day of my death, without impeachment of waste, upon the trusts and for the intents and purposes, and subject to the provisoes and declarations hereinafter declared and directed concerning the said term, and from and after the expiration or sooner determination of the said term and in the mean time subject thereto and to the trusts thereof, to the use of *James Walter Earl of Verulam*, and *John Thomas Viscount Sydney* and their heirs, during the natural life of my brother the Honourable and Reverend *Francis Henry Egerton*, in trust to preserve contingent remainders: with remainder to the use of the first or only son of the body of my said brother lawfully begotten, born in my lifetime or in the womb at my decease, for and during the term of ninety-nine years thence next ensuing, if such first or only son shall so long live, without impeachment of waste: with remainder to the use of the said Earl of *Verulam* and Viscount *Sydney*, and their heirs during the life of such first or only son, upon trust to preserve contingent remainders: with remainder to the first and other sons lawfully begotten of the body of such first or only son of my said brother, severally and successively according to

1851.
EGERTON
v.
LORD
BROWNLOW.

1851.

EGERTON

v.

LORD
BROWNLOW.

seniority, in tail male, with several remainders and limitations to the use of the second and every other younger son and sons of the body of my said brother lawfully begotten, born in my lifetime or in the womb at my decease, for the several terms of ninety-nine years determinable on their respective deaths, and to the same trustees and their heirs during the life or lives of such second and other sons respectively, upon trust to preserve contingent remainders, and to the first and other sons lawfully begotten of the body or bodies of such second and other younger son or sons of my said brother, severally and successively according to seniority, in tail male, such second and other younger sons of my said brother to take severally and successively, and every elder of them and the issue male of his body to take and be preferred before the younger and the issue male of his or their body or respective bodies: with remainder to the use of the heirs male of the body of my said brother lawfully issuing: with remainder to the use of the said *Charlotte Catherine Anne* Countess of *Bridgewater*, my wife, and her assigns for and during the term of her natural life, without impeachment of waste: and from and after her decease, to the use of the said *Dame Amelia Long* for the term of ninety-nine years if she shall so long live: remainder to the said *John Earl Brownlow* and *Edward Herbert* Lord Viscount *Clive* and their heirs during her life, in trust to preserve contingent remainders: remainder to the use of the heirs male of the body of the said *Dame Amelia Long*: remainder to the use of *John Hume Cust*, commonly called Lord Viscount *Alford*, the eldest son of the said *John Earl Brownlow* by my niece *Sophia Lady Brownlow*, his late wife deceased, *for and during the term of ninety-nine years computed as aforesaid, if the said John Hume Lord Viscount Alford shall so long live*: remainder to the use of the said *Edward Herbert* Lord

Viscount *Clive* and Sir *Charles Long* and their heirs, during the life of the said *John Hume Lord Viscount Alford*, in trust to preserve contingent remainders: remainder to the use of the heirs male of his body: with remainder, in default of such issue, to the use of the Honourable *Charles Henry Cust*, second and only younger son of the said *John Earl Brownlow* by the said *Sophia Lady Brownlow* his late wife, for the term of ninety-nine years computed as aforesaid, if he the said *Charles Henry Cust* shall so long live: remainder to the use of the said *Edward Herbert Lord Viscount Clive* and Sir *Charles Long* and their heirs during the life of the said *Charles Henry Cust*, upon trust to preserve contingent remainders: remainder to the use of the heirs male of the body of the said *Charles Henry Cust*: subject nevertheless, as to the several uses and estates so to be limited to the said *John Hume Lord Viscount Alford* and *Charles Henry Cust*, and to the trustees during their respective lives, and to the heirs male of their respective bodies, to the several provisoes for the determination thereof hereinafter contained: with remainder to the use of *Wilbraham Egerton*, of *Tatton*, in the county of *Chester*, Esquire, and his assigns for and during the term of his natural life, without impeachment of waste: and from and after the determination of that estate by any means in his lifetime, to the use of the said *Edward Herbert Lord Viscount Clive* and Sir *Charles Long* and their heirs, during the life of the said *Wilbraham Egerton*, in trust to support and preserve the contingent uses and estates hereinafter declared and directed, nevertheless to permit and suffer the said *Wilbraham Egerton* or his assigns during his life to receive and take the rents and profits of the premises for his or their own use: with remainder, from and after the decease of the said *Wilbraham Egerton*, to the use of *William Tatton Egerton*, eldest son

1851.
EGERTON
v.
LORD
BROWNLOW.

1851.
 EGERTON
 v.
 LORD
 BROWNLOW.

of the said *Wilbraham Egerton*, during his life, without impeachment of waste : remainder to the said *Edward Herbert* Lord Viscount *Clive* and Sir *Charles Long* and their heirs, during his life, in trust to preserve contingent remainders, and to permit him to take the rents and profits as aforesaid : remainder to the first and other sons of the said *William Tatton Egerton*, severally and successively according to seniority, and the heirs male of their respective bodies, every elder son and his issue male to be preferred to the younger and his issue male :” with divers remainders over ; and with the ultimate remainder to the testator's own right heirs.

“ And I declare that in the settlement to be made pursuant to this my will, my said estates are not to be limited successively to the use of the first and other sons of my said brother, or of the said Dame *Amelia Long*, or of the said Lord Viscount *Alford*, or of the said *Charles Henry Cust*, in tail male, but to the heirs male of their respective bodies, in the words of this my will ; it being my intention that the vesting of my estates in the heirs male of their respective bodies, shall be suspended during the lives of my said brother, the said Dame *Amelia Long*, the said Lord Viscount *Alford* and the said *Charles Henry Cust*, respectively :”

“ Provided also, and I declare my will to be that every person who shall be entitled under the uses and limitations of this my will, or any settlement pursuant thereto, to the beneficial enjoyment of my said estates or any part thereof, for any term of years determinable on his death, or as tenant for life in possession, or as tenant in tail in possession, shall take and assume, or shall retain, as the case may require, the surname and arms of *Egerton* only, and shall at all times thereafter continue to use

and bear such surname and arms, and no others; And that in case any such person not then having such surname and arms shall neglect or refuse to assume and take the same for six calendar months after he shall become so entitled in possession, or having then or having within the time so limited assumed and taken such surname and arms, shall afterwards discontinue to use and bear the same, or assume or use any other surname, or bear any other arms than the name and arms of *Egerton*, then and in every such case, the use and estate directed to be limited to every such person so refusing, neglecting, or discontinuing to use the name and arms of *Egerton* only, who shall take for a term of years determinable on his death, or for his life, and also the use or estate directed to be limited to trustees and their heirs, during his or her life, for preserving contingent remainders, and the trusts thereof, and also the use or estate directed to be limited to the heirs male of his body, or all such of the uses or estates directed to be limited to the sons of any such person in tail male, as, for the time being, shall be in contingency or suspense, as the case may happen, shall thereupon cease, determine and be void; or if the person so refusing, neglecting or discontinuing to use the name and arms of *Egerton* only, shall be tenant in tail, whether by purchase or descent, under or according to the uses or limitations declared or directed by this my will, then the estate tail limited to or vested by descent in him, shall absolutely determine and be void; and that thereupon my said estates shall go over and stand limited to the posterior uses and limitations thereof declared or directed by this my will, and the powers, privileges and authorities annexed to the same, and the trusts and purposes to be declared thereof respectively, shall be advanced and take effect as if the use or estate uses or estates so directed

1851.
EGERTON
v.
LORD
BROWNLOW.

1851.

EGERTON

v.

LORD

BROWNLOW.

to determine, had never been created, and so *toties quoties*; and that every person so assuming and taking the surname and arms of *Egerton* in compliance with such proviso, shall apply for and use his utmost endeavours to obtain, as soon as reasonably may be, His Majesty's licence or authority under his sign manual, or an Act of Parliament to sanction the same, and every person neglecting or refusing so to do shall be deemed to have refused to take such surname and arms as aforesaid, and the said proviso shall take effect accordingly as if he had actually refused so to do, but that, notwithstanding such proviso, any person succeeding to the enjoyment of my said estates, and having any title of honour, shall be at liberty to retain the same, except as hereinafter provided in respect to the said *John Hume Lord Viscount Alford* and *Charles Henry Cust*:

"Provided always, and I declare my will to be that the uses and estates hereinbefore directed to be limited to the said Dame *Amelia Long* for ninety-nine years if she shall so long live, and to trustees for her life to preserve contingent remainders, and to the heirs male of her body, shall cease and be void in case there shall not be any issue male of her body lawfully begotten living at the determination of the several precedent uses or estates hereinbefore directed to be limited during the life of my said brother and to the heirs male of his body, and to my said wife; and that, in such case, my said estates shall go over and be settled and limited as if the said Dame *Amelia Long* were actually dead without issue male; nevertheless, without prejudice to the said annuity hereinbefore given to the said Sir *Charles Long* and Dame *Amelia Long*, which shall, in such case, continue charged on my said estates in *Shropshire* and *Cheshire*, and be payable to them respectively as I have hereinbefore

directed: Provided always, and I declare my will to be that in case the use or estate hereinbefore directed to be limited to my niece, the said Dame *Amelia Long*, for the term of ninety-nine years, shall be determined in her lifetime by virtue of the proviso lastly hereinbefore contained, my said estates in *Shropshire* and *Cheshire* hereinbefore charged with the payment of the said annuities of 4000*l.* to the said Sir *Charles Long* and Dame *Amelia* his wife respectively, shall also be charged and chargeable, in addition to such of the same annuities as shall for the time being be payable, with the payment of an annuity of 8000*l.* to the said Dame *Amelia Long* or her assigns during the remainder of her life, commencing from the time when such her estate for ninety-nine years shall be so determined, and with the like powers and remedies for the recovery thereof when in arrear; and such annuity of 8000*l.* shall be payable half-yearly and clear of all deductions, on the same several days of payment, and be raisable under the trusts of the said term of ninety years in like manner as I have hereinbefore directed in respect of the said annuities of 4000*l.*; the first payment of the said annuity of 8000*l.* to be made on such of the said half-yearly days of payment as shall next happen after the commencement of the same annuity: "Provided always, and I declare my will to be *that if the said John Hume Lord Viscount Alford shall die without having acquired the title and dignity of Duke or Marquis of Bridgewater * to him and the heirs male of his body, then and in such case the use and estate hereinbefore directed to be limited to the heirs male of his body,*

1851.
EGERTON
v.
LORD
BROWNLOW.

Provisoes as to neither Lord *Alford* nor Mr. *Cust* acquiring the title of Duke or Marquis of *Bridgewater*.

* *Scroope*, fourth Earl of *Bridgewater*, was created Marquis of *Brackley* and Duke of *Bridgewater*. The title of Duke and Marquis became extinct on the death of *Francis*, the third Duke and sixth Earl, in 1803.

1851.

EGERTON

v.

LORD
BROWNLOW.

shall cease and be absolutely void ; and that if the Earldom of Brownlow shall descend and come to him, and he shall not have acquired, or shall not acquire the title and dignity of Duke or Marquis of Bridgewater, to him and the heirs male of his body, before the end of five years next after he shall become Earl Brownlow, then and in such case the several uses and estates hereinbefore directed to be limited to the said John Hume Lord Viscount Alford, and to trustees during his life for preserving contingent remainders, and to the heirs male of his body, shall thenceforth cease and be absolutely void, and that my said hereditaments and real estates hereinbefore devised shall, in either of the said cases, thereupon go over and be enjoyed according to the subsequent uses and limitations declared and directed by this my will, as if the said John Hume Lord Viscount Alford were actually dead without issue male : Provided also, and I declare my will to be that if it shall happen that the said John Hume Lord Viscount Alford shall not acquire the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, with the immediate limitation over of such title and dignity to the said Charles Henry Cust and the heirs male of his body, or to the heirs male of his body if he shall be dead leaving issue male, and also, that the said Charles Henry Cust shall not acquire the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, then and in such case the use and estate hereinbefore directed to be limited to the heirs male of the body of the said Charles Henry Cust, shall cease and be absolutely void : and that if the Earldom of Brownlow shall descend and come to him the said Charles Henry Cust, and he shall not have acquired or shall not acquire the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, before the end of five years next

after he shall become Earl *Brownlow*, then and in such case the several uses and estates hereinbefore directed to be limited to the said *Charles Henry Cust* and to trustees during his life for preserving contingent remainders, and to the heirs male of his body, shall thenceforth cease and be void, and that in either of such cases my said hereditaments and real estates hereinbefore devised shall thereupon go over and be enjoyed according to the subsequent uses and limitations of this my will, as if the said *Charles Henry Cust* were actually dead without issue male: Provided also, and I declare my will to be, that if my brother the said *Francis Henry Egerton* shall be created Duke or Marquis of *Bridgewater*, with such limitations over of the said title and dignity as that the same may, immediately after the failure of issue male of my said brother, come to the said *John Hume* Lord Viscount *Alford* and the heirs male of his body, and after them to the said *Charles Henry Cust* and the heirs male of his body; then and in such case my said hereditaments and real estates hereinbefore devised shall be settled, limited and enjoyed in such manner as if the several provisoes hereinbefore expressed for the determination of the uses or estates directed to be limited to the said *John Hume* Lord Viscount *Alford* and *Charles Henry Cust*, and to trustees during their lives for preserving contingent remainders, and to the heirs male of their bodies respectively, subsequent to the proviso for taking and using the name and arms of *Egerton* only, had not been contained in this my will: Provided also, and I declare my will to be that if the said *John* Earl *Brownlow* shall, in case of the death and failure of issue male of my said brother in his lifetime, be created Duke or Marquis of *Bridgewater*, the said title and dignity being limited to him and the heirs male of his body by the said *Sophia* Lady *Brownlow* his late wife only, and not being inherit-

VOL. I. N. S.

K K

1851.
 EGERTON
 v.
 LORD
 BROWNLOW.

Proviso as to Lord *Brownlow* being created Duke or Marquis of *Bridgewater* with a limitation of the title to him and the heirs male of his body by his late wife.

1851.

EGERTON

v.

LORD
BROWNLOW.

able by or limited to any other issue male of the said *John Earl Brownlow*, the same shall be thenceforth equivalent to the acquisition of such title and dignity by the said *John Hume Lord Viscount Alford*, to him and the heirs male of his body, with limitations over to the said *Charles Henry Cust* and the heirs male of his body; and my said hereditaments and real estates shall be settled and limited so as to go and be enjoyed, thenceforth and for the future, as if the several provisoes hereinbefore expressed for the determination of the several uses or estates directed to be limited to the said *John Hume Lord Viscount Alford*, and to the said *Charles Henry Cust*, and to trustees during their lives for preserving contingent remainders, and to the heirs male of their bodies respectively, subsequent to the proviso for taking and using the name and arms of *Egerton* only, had not been contained in this my will, notwithstanding the previous determination, if it shall happen, of the uses or estates directed to be limited to the heirs male of the bodies of the said *John Hume Lord Viscount Alford* and *Charles Henry Cust*, under any of such several provisoes: Provided always, and I declare my will to be that if the said *John Earl Brownlow* shall hereafter take any other title than Duke or Marquis of *Bridgewater*, so as to be inheritable by or limited to the issue male of his body by the said *Sophia Lady Brownlow* his late wife, or any of them, then and in such case the uses and estates hereinbefore declared and directed to be limited to the said *John Hume Lord Viscount Alford* and *Charles Henry Cust*, and to trustees during their lives for preserving contingent remainders, and to the heirs male of their bodies respectively, shall thenceforth cease and be void, and that thereupon my said hereditaments and real estates shall go over, and be limited and enjoyed according to this my will, as if the said *John Hume Lord Vis-*

count *Alford* and *Charles Henry Cust* were actually dead without issue male.

1851.

EGERTON

v.

LORD

BROWNLOW.

Proviso in case Lord *Alford* or *Charles Henry Cust* should take any title higher than that of Marquis of *Bridgewater*, except that of Duke of *Bridgewater*.

* *Sic.*

* *Sic.*

“ Provided also, and I declare my will and intention to be that my said hereditaments and real estates shall not be enjoyed by the said *John Hume* Lord Viscount *Alford* or the heirs male of his body, if he shall by any means whatsoever succeed to or take any title (other than Duke of *Bridgewater*) to which the Marquis * of *Bridgewater* shall not, if then, or would not if thereafter to be created, be superior in rank or have precedence being of the same rank, nor by the said *Charles Henry Cust* or the heirs male of his body, if he shall take any title either by immediate creation, limitation over or otherwise other than Duke of *Bridgewater*, to which the Marquis * of *Bridgewater* shall not, if then, or would not if thereafter to be created, be superior in rank, or take precedence if of the same rank, and that the uses and estates hereinbefore directed to be limited to such of them the said *John Hume* Lord Viscount *Alford* and *Charles Henry Cust* as shall take any such title contrary to this my will, and to trustees for his life to preserve contingent remainders, and to the heirs male of his body, shall thenceforth cease and be void, and thereupon my said hereditaments and real estates shall go over and be enjoyed according to the subsequent uses or limitations of this my will, as if he or they taking such other title contrary to this my will, were actually dead without issue male.”

The testator then declared that the term of ninety years should be upon the following, amongst other trusts, namely, to pay the annuities given to his wife and Sir *Charles* and *Lady Long* out of the rents of his *Shropshire* and *Cheshire* estates, and an annuity of 18,000*l.* to his brother *Francis Henry Egerton*, and a yearly sum

Trusts of the ninety years' term.

1851.
 EGERTON
 v.
 LORD
 BROWNLOW.

not exceeding 8000*l.*, for the maintenance and education of Lord *Alford* and *Charles Henry Cust* during their minorities (in case they should become entitled to the estates, before they attained twenty-one, in remainder immediately expectant on the determination of the term of ninety years,) out of the rest of his trust estates in general.

Power to jointure, &c.

And he declared that his brother should be empowered, by the settlement to be made of his estates, to charge them with a jointure and with portions; and that, by the same settlement, there should be given to each and every male person who, after the death of his said brother, should succeed to and for the time being be entitled in possession for the term of ninety-nine years determinable on his death, or as tenant for life in possession, or tenant in tail in possession, under the uses, limitations or trusts thereby declared or directed, (except the trustees or trustee for preserving contingent remainders,) in the same order and priority as they should respectively succeed to the possession of his said estates, such or the like power and authority to charge all or any of his said estates with a jointure for any woman or women whom he should have married or should marry, except that his estates or any part thereof should never, at any one time, be chargeable, under any appointments or settlements to be made under and in pursuance of the powers thereby given to his brother and to the several other persons aforesaid in that behalf, or under any of such powers, with the payment of more than two such jointures.

Proviso determining jointures to be made by Lord *Alford* and *Charles Henry*

“ Provided also, and I declare my will to be that if the use or estate hereinbefore limited to the said *John Hume* Lord Viscount *Alford* for the term of ninety-nine years, determinable as aforesaid, or the use or estate limited to

the heirs male of his body as aforesaid, shall be determined and made void by virtue or according to any of the provisoes for that purpose hereinbefore contained, any jointure to be made or covenanted to be made by him as aforesaid, shall thenceforth cease and be void, and that if the use or estate hereinbefore limited to the said *Charles Henry Cust* for ninety-nine years determinable as aforesaid, or the use or estate hereinbefore limited to the heirs male of his body, shall be determined and made void by virtue or according to any of the provisoes for that purpose hereinbefore contained, any jointure to be made or covenanted to be made by him as aforesaid, shall thenceforth cease and be void, and that any jointure which shall have been made or covenanted and agreed to be made by any person whose estate or interest shall be determined by reason of his refusing, neglecting or discontinuing to use the name and arms of *Egerton*, or of his using any other surname or arms, or of his refusal or neglect to apply for the King's licence or an Act of Parliament for that purpose, shall thenceforth cease and be absolutely void."

1851.
EGERTON
v.
LORD
BROWNLOW.
Cust in case the
limitations to
them and their
heirs male
should become
void.

The testator made several codicils, the first of which was, in part, as follows: "In case my wife *Charlotte Catherine Anne* Countess of *Bridgewater* shall become entitled to my real estates, as tenant for life in possession, under the uses or trusts declared and directed by my will, I recommend it to her (but leaving her at liberty according to her own discretion to comply with such recommendation or not, and not intending it to be obligatory) to make such allowance as she may think proper, from time to time, out of the annual income of the estates to which she shall be so entitled, for or towards the maintenance and support of such of the

First codicil.

1851.
 EGERTON
 v.
 LORD
 BROWNLOW.

male descendants of my late niece *Sophia Lady Brownlow* deceased as may, for the time being, be Marquis or Duke of *Bridgewater* or the apparent or presumptive heir to such title in case the Right Honourable *John Earl Brownlow*, her husband, *shall be created* Marquis or Duke of *Bridgewater* in the manner expressed in my will and be living : and I desire that the allowance to be made for that purpose may be applied in such manner as my said wife shall direct : And in case the Right Honourable *John Hume* Lord Viscount *Alford*, the eldest son and heir apparent of the said *John Earl Brownlow*, shall come into the enjoyment of my said trust estates under the uses or limitations thereof declared and directed by my said will, I recommend it to him to permit his younger brother, the Honourable *Charles Henry Cust*, to enjoy the estates to which the said *John Hume* Lord Viscount *Alford* is now entitled in remainder under the limitations of the will of his paternal grandfather the late Lord *Brownlow* and the several settlements made on the marriage of the said *John Earl Brownlow* with the said *Sophia Lady Brownlow* his late wife : and if the said Lord Viscount *Alford* shall become Duke or Marquis of *Bridgewater*, so that my estates shall be permanently settled on him and his male descendants, that he shall settle or concur in settling the said other estates to which he is now entitled as aforesaid, upon his said younger brother and his male issue in a course of strict limitation ; but I declare this is to be understood as a recommendation only, and is not intended to be imposed upon him as an obligation, as, otherwise, his refusal to comply therewith might tend to defeat my object of uniting my estates to the title of Duke or Marquis of *Bridgewater* according to the limitations contained in my will, *if it shall be the pleasure of the*

Crown to create such title so as to come to the heirs male of the said John Earl Brownlow and his issue male by the said Sophia his late wife."

1851.
EGERTON
v.
LORD
BROWNLOW.
Death of testa-
tor and other
events.

The testator died, without issue, on the 21st of October 1823; and, thereupon, his brother, *Francis Henry Egerton*, became Earl of *Bridgewater*. He died a bachelor, on the 11th of February 1829, without having been created either Duke or Marquis of *Bridgewater*; and, on his death, the Earldom became extinct. Lady *Long*, who became Lady *Farnborough*, in consequence of her husband having been created Lord *Furnborough*, died, without leaving issue, on the 16th of June 1837. She and *Sophia* Lady *Brownlow*, deceased, the mother of Lord *Alford* and *Charles Henry Cust*, were the only children of Lady *Amelia Hume*, the testator's only sister; and, on Lady *Farnborough's* death, Lord *Alford* became the testator's heir-at-law. Lord *Farnborough* died on the 18th of January 1838; and, in June 1840, *Wilbraham Egerton*, Esq. the elder, was appointed a trustee of the will in his place. The testator's widow died on the 11th of February 1849. Lord *Alford* complied with the direction in the will as to taking the name and arms of *Egerton* and exercised the power of jointuring, contained in the will. He died on the 3rd of January 1851, leaving the Plaintiff, who was an infant, his eldest son and the heir male of his body. The Plaintiff and *Charles Henry Cust* also complied with the direction as to taking the name and arms of *Egerton*.

The bill which was filed in February 1851 against Pleadings. the trustees, Lord *Alford's* widow, in whose favour his Lordship had exercised the power of jointuring contained in the will, *Charles Henry Egerton* and his son and *William Tatton Egerton* and his son, after

1851.

EGERTON
v.
LORD
BROWNLOW.

stating the will and codicils and the facts above detailed, alleged that there was not, at the time of the date of the will or of the testator's death, a Dukedom or Marquisate of *Bridgewater* either in existence or abeyance; and that it had not, since the decease of the testator, been the pleasure of the Crown to create any such Dukedom or Marquisate, or any such title of Duke or Marquis of *Bridgewater*: That the Plaintiff's father did not, after the date of the will, succeed to, acquire or take any title whatever; and that *John Earl Brownlow* had not, since the date of the will, taken any title whatever: That the Plaintiff was advised that, notwithstanding the provisoes and declarations in the will having reference to the title and dignity of Duke or Marquis of *Bridgewater*, *he was equitable tenant in tail in possession, under or by virtue of the will, of the estates subject to the trusts thereof*: That *Charles Henry Egerton, Wilbraham Egerton* the elder, *William Tatton Egerton* and *Wilbraham Egerton*, the son of *William Tatton Egerton*, contended that, *by reason of the Plaintiff's father having died without acquiring the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, the use and estate by the will directed to be limited to the heirs male of the Plaintiff's father, had ceased and become absolutely void, and that the testator's estates had gone over to Charles Henry Egerton, and that Charles Henry Egerton was then entitled to the receipt of the rents and profits of all the estates; and that his son also claimed an interest in the matters in question in the suit*: That the Plaintiff's title being disputed as aforesaid, the trustees of the will were unable to act without the direction of the Court.

The bill prayed that it might be declared, by the Court, that the Plaintiff was, under and by virtue of the

will, equitable tenant in tail male in possession of the estates subject to the trusts of the will ; and that the trustees might be decreed to account, with him, for such (if any) of the rents and profits of the estates, from the death of his father, as might have been received by them : And that some person might be appointed to manage the estates and receive the rents and profits thereof, in the mean time and until it should have been ascertained whether the Plaintiff or *Charles Henry Egerton* was the party entitled to the possession and receipt of the rents and profits of the estates.

1851.
EGERTON
v.
LORD
BROWNLOW.

All the Defendants, except Lady *Alford*, demurred to the bill for want of equity.

Mr. *Russell* and Mr. *Giffard*, for *Charles Henry Egerton* and his son, said that the testator had directed the limitations to Lord *Alford* and *Charles Henry Egerton* and the heirs male of their bodies, to be made subject to the provisos contained in the subsequent part of his will ; so that the provisos were incorporated with the creation of the estates : that Lord *Alford* was to have the whole of his life to perform the condition of acquiring the title of Duke or Marquis of *Bridgewater* ; and, therefore, it could not defeat the interest which *he* was to take ; and that, *quoad* his heirs male, it was a condition precedent ; for the performance of it must, necessarily, precede the vesting of any estate in them : that there was nothing that invalidated the condition in the slightest degree : that it was not impossible to be performed at the time of its creation : that it did not offend against any rule or maxim of law : that it did not involve anything that was either *malum in se*, or *malum prohibitum*, or repugnant to the estate, nor was it

Argument in
support of the
demurrers.

1851.

EGERTON
v.
LORD
BROWNLOW.

against public policy;* but, on the contrary, it was an incitement to the parties on whom it was imposed, to be good and loyal subjects: that, though it was not in the power of the parties, themselves, to perform the condition, it was, nevertheless, good: that the Crown could do no wrong; and, therefore, there was no ground for assuming that it would be actuated by any unworthy motive in the exercise of its prerogative, or that it would confer distinctions upon persons who were undeserving of them; and that it had frequently conferred a peerage on the ground that the person on whom it was conferred, held the property of the last person who had held the peerage. They cited *Mitchell v. Reynolds* (a), Co. Litt. 206 and 207; Shep. Touch. 129; Com. Dig. title Condition, D. 1 and 2; 1 Rolle's Abr. 419 and 420; *Doe v. Lord Scarborough* (b), and *Cooke v. Turner* (c), and they distinguished the case of *Lord Kingston v. Pierrepont* (d) from the present, on the ground that it was illegal to purchase a peerage, and therefore the bequest in that case, which was made for that purpose, was clearly void.

The *Solicitor-General*, Mr. *Malins*, Mr. *Elmsley* and Mr. *Rendall*, for *Wilbraham Egerton* the elder and *William Tatton Egerton* and his son, after observing that the trusts of the will were executory, and, therefore, the Court might mould them so as to give effect to the testator's intention, and that the proviso as to acquiring the title of Duke or Marquis of *Bridgewater*, was

* The late Mr. *Bell*, Mr. *Sanders* and Mr. *Duval*, had given an opinion, in conjunction with Mr. *Temple*, that the condition was void as being against public policy, but they did not state their reasons.

(a) 1 P. Wms. 189.

(c) 15 Mees. & Wels. 727;

(b) 3 Adol. & Ell. 3 and and 14 Sim. 493.

897.

(d) 1 Vern. 5.

incorporated with the limitations directed to be made of the estates, contended that the effect of the limitations and the proviso taken together, was to create, not a condition properly so called, but a contingent remainder with a double aspect; that the contingency was perfectly good and valid in law; and, accordingly, the Court ought, if Lord *Alford* had not died, to have directed the estates to be limited to him for ninety-nine years if he should so long live; remainder to the trustees during his life, in trust to preserve contingent remainders; remainder, if he should acquire the title, to the heirs male of his body, but, if he should not acquire it, to *Charles Henry Cust*: that, by the expression, "acquire the title" the testator meant, "acquire it by the grant or creation of the Crown," as appeared from his first codicil; and it was not to be assumed that any improper means would be resorted to in order to obtain the title: that, whether the proviso created a contingency, or whether it created a condition, and whether the condition was precedent or subsequent, it was quite consistent with the rules of law and with public policy; and, Lord *Alford* having died without either of the titles having been conferred upon him, the consequence was that the Plaintiff's interest in the estates under the will, never arose, or if it did, it had been divested. *Papillon v. Voice* (e), *Lord Stamford v. Sir John Hobart* (f), *Loddington v. Kime* (g), *Tollemache v. Lord Coventry* (h), *Perkins's Profitable Book*, 317; *Rolle's Abr.* 451; *Tippen v. Cosen* (i), *Gulliver v. Shuckburgh Ashby* (k), *Page v. Hayward* (l),

1851.
EGERTON
v.
LORD
BROWNLOW.

(e) 2 P. Wms. 471.

(i) 4 Mod. 381, and Car-
thew, 272.

(f) 3 Brown's P. C. 31.

(g) 1 Lord Raym. 203 and

(k) 4 Burr. 1930.

l Salk. 224.

(l) 2 Salk. 570.

(h) 2 Clar. & Fin. 611.

1851.

EGERTON

v.

LORD

BROWNLOW.

Shep. Touchstone, 116, 117, 125, and 183; *Peyton v. Bury* (m), *Davies v. Lowndes* (n), *Mackworth v. Hinxman* (o).

Sir *F. Kelly*, Mr. *Bethell*, and Mr. *C. Hall* for the Plaintiff.

Argument in support of the bill.

The proviso in question creates a conditional limitation: consequently the condition involved in it, is a condition subsequent: and, as the effect of such a condition is to defeat estates previously limited, it is odious in law, and must be construed strictly: *Gilbert* on Uses, 3rd edition (p), *Doe v. Crisp* (q). The proviso cannot be embodied with the limitations, as the *Solicitor-General* contended it could; for it makes the uses directed to be limited to Lord *Alford* and to the trustees to preserve contingent remainders during his life, as well as the use directed to be limited to the heirs male of his body, to cease and be absolutely void, in the event of the Earldom of *Brownlow* descending upon him and of his not acquiring the title of Duke or Marquis of *Bridgewater* within five years afterwards.

Next we contend that the condition is void because it is an impossible condition. The condition, which, as we said before, must be construed strictly, is not if the Crown shall not be pleased to confer the title on Lord *Alford*, but if he shall fail to *acquire* the title. The word, 'acquire' is totally inapplicable to a title: for it cannot be acquired by a subject, as a fortune or fame may

(m) 2 P. Wms. 626.

(n) 2 Scott, 71.

(o) 2 Keen, 658.

(p) Note to page 152, see particularly 177.

(q) 8 Adol. & Ell. 779.

be, that is, it cannot be obtained by his own acts or exertions. The Duke of *Wellington* cannot be said to have acquired the title of duke, by gaining the battle of *Vittoria*; though the title was conferred upon him in consequence of his having gained that battle. If, however, the condition is not impossible, the conferring of a particular title upon a particular individual, is so remote a possibility, that the law will not allow it to be made the subject of a condition: *Shep. Touchst.* 129, 132, 133; *Co. Litt.* 220; *Bac. Abr.* title, Conditions (M); *Com. Dig.* title, Condition (D D, 1 and 2); 2 *Black. Comment.* 156; *Cholmley's case* (r), *Perkins's Prof. Book*, 142; *Fearne's Cont. Rem.* 248, 250, 251. The instances which are put in those authorities, are precisely in point: it was quite as impossible for Lord *Alford* to procure himself to be created either Duke or Marquis of *Bridgewater*, as it was for him to go to *Rome* in three days. So the reviving of an extinct peerage, the creation of a corporation, and the coming into *esse* of a person bearing a particular name and his afterwards dying without issue, are events so improbable that the law will not allow the vesting of an estate to depend upon the happening of any of them.

Another ground on which we contend that the condition is void, is that it is against public policy: for it tends to induce Lord *Alford*, and holds out to him the strongest temptation to use, in a corrupt and unconstitutional manner, the great power and influence which the testator's estates, (which are worth more than 60,000*l.* a year) would give him, in order to obtain the title; and it tends to induce him to use, in like manner and for the same purpose, the vote in the House of Peers which he

1851.
EGERTON
v.
LORD
BROWNLOW.

(r) 2 Co. 50.a.; see 3 Ca. in Chan. 29, pl. 8.

1851.

EGERTON

v.

LORD
BROWNLOW.

would acquire when his father's earldom should descend upon him : an event which the testator himself contemplates. It is no answer to this objection to say that the Crown can do no wrong, and that the law will not presume that the ministers of the Crown will be actuated by any improper motives, or that Lord *Alford* will resort to any corrupt or unconstitutional practices in order to obtain the title. In *Lord Kingston v. Pierrepoint* (s) the legatees of the 10,000*l.* were expressly enjoined, by the testator, to use lawful means to procure a dukedom ; but, nevertheless, the bequest was held to be void. If the condition tends to induce Lord *Alford* to do, or holds out to him an inducement or temptation to do what is unlawful or unconstitutional, it is void : *Gilbert v. Sykes* (t). That case and the cases referred to in the judgment in it, show that, though the law does not presume that a subject of this realm will act illegally or immorally, still it will not uphold a contract which places his interest in conflict with his duty, or holds out an inducement or temptation to him to act illegally or immorally. The principle of that case applies, very closely, to the present ; and we submit that a Court of Equity will not uphold a clause in a will which makes it the interest of a party interested under the will, or holds out an inducement or temptation to him to act corruptly or unconstitutionally. In the case cited and the cases there referred to, the temptation was trifling : in this case it is property producing more than 60,000*l.* a year, which must go away from Lord *Alford* and his heirs male, unless he obtains the title. And we may here remark that, by

(s) 1 Vern. 5.

(t) 16 East, 150. This case and the cases of *Cole v. Gower*, *Da Costa v. Jones*, and *Jones v. Randall* which Lord *Ellenborough*, C. J., refers to in his judgment, were much relied upon.

another clause in the will, Lord *Alford* and his heirs male are to lose this most valuable property, if he succeeds to or takes, in any manner, any title, other than that of Duke of *Bridgewater*, to which the title of Marquis of *Bridgewater* shall not have precedence. Do not these clauses hold out the strongest inducement and temptation, to Lord *Alford*, to use his power and influence as a peer, when he shall become one, and the great power and influence which such immense property will give him, to influence, and, it may be, to corrupt the ministers of the Crown in order to procure the title of Duke or Marquis of *Bridgewater*, the procuring of which is the condition on which he and his descendants are to retain the property.

1851.
EGERTON
v.
LORD
BROWNLOW.

There is one other objection to the clause which creates that condition; namely, that it tends to perplex and embarrass the Crown, if not to fetter and restrain it, in the exercise of its prerogative of conferring titles. That clause, in effect, tells the Crown that, unless it confers the title of Duke or Marquis of *Bridgewater* upon Lord *Alford*, he will lose 60,000*l.* a year. Now, suppose that Mr. *Charles Henry Egerton* or one of the remaindemen, the *Egertons of Cheshire*, had rendered important services to his Sovereign and country, and that the Sovereign, in order to reward his merits, were about to confer on him the title of Duke or Marquis of *Bridgewater*, would not the Sovereign be placed in a situation in which no subject has a right to place his Sovereign, if she were told that, if she did what she was about to do, she would deprive Lord *Alford* and his family of more than 60,000*l.* a year?

The *Vice-Chancellor*.—Is there any clause in the will which makes the uses limited to Lord *Alford* and his

1851.
 EGERTON
 v.
 LORD
 BROWNLOW.

heirs male, cease, if any one else becomes Duke or Marquis of *Bridgewater*? According to a petition now pending in the House of Lords, there are two Dukes of *Montrose*: and we all know that there are two Lords *Stanley*, and several Lords *Grey*. Might there not be two Dukes or Marquises of *Bridgewater*?

Argument resumed.—There is no such clause in the will; and there, certainly, might be two Dukes or Marquises of *Bridgewater*: but it is a remote probability, and the same embarrassment and perplexity would exist in the mind of the Crown, as if it had not the power to confer the same title upon two individuals. Suppose that the Crown, when it was about to ennoble Lord *Francis Egerton*, had intended to bestow upon him the title of Marquis of *Bridgewater* instead of Earl of *Ellesmere*, can any one say that it would not have been very much embarrassed and perplexed, in the exercise of the royal prerogative, when it was told of this proviso, notwithstanding the possibility of there being two Marquises of *Bridgewater*? Again, suppose the Crown not to have conferred the title of Duke or Marquis of *Bridgewater* upon any one, and to be minded to confer it on Lord *Alford*, would it not feel very much perplexed and embarrassed when it was told that, by exercising the royal prerogative in the manner proposed, it would be disposing, in effect, of property to the amount of 60,000*l.* a year—that it would fix that property in Lord *Alford* and his descendants, and deprive Mr. *Charles Henry Egerton* and the *Egertons* of *Cheshire*, of all chance of succeeding to it? What right has a subject to place the Crown in a situation in which it cannot exercise the royal prerogative, without interfering with private rights? It does so happen that Lord *Alford* was the testator's heir-at-law; but he might have been only a distant relation, and Mr. *Wilbraham Eger-*

ton, might have been the heir : in that case the Crown would have been placed in a situation still more embarrassing and perplexing.

1851.
EGERTON
v.
LORD
BROWNLOW.

The learned Counsel then observed that the clause in the will which provided that the estates should not be enjoyed by Lord *Alford* or his heirs male if he should succeed to or take any higher title than that of Marquis of *Bridgewater*, except that of Duke of *Bridgewater*, imposed a penalty upon Lord *Alford* if he did not do what no subject had the power to do, namely, refuse to accept a peerage : *The Duke of Queensberry's case* (u), *Lord Purbeck's case* (x) : and also that it tended to embarrass and perplex the Crown ; for Lord *Alford* might have rendered important services to his country, and the Crown might have been disposed to reward his services by creating him not Duke or Marquis of *Bridgewater*, but Duke or Marquis of *Cheshire*. The learned Counsel concluded by submitting that the condition was void, as being impossible to be performed ; as violating public policy, and as interfering with the exercise of the prerogative of the Crown ; and, consequently, that the estates had become vested in the Plaintiff, as the heir male of the body of Lord *Alford* ; and, therefore, the demurrers ought to be overruled.

The *Vice-Chancellor* said that the question was a legal one ; and, therefore, that he ought to take the opinion of a Court of law upon it. The Counsel replied that it was doubtful whether the Court could direct a case to be stated for the opinion of a Court of law, except at the hearing of a Cause ; but that, however that might be, they wished his Lordship to decide the question.

(u) 1 P. Wms. 582.
VOL. I. N. S.

(x) 1 Shower's P. C. 1.
L L

1851.

Mr. *Russell* and the *Solicitor-General* replied.

EGERTON

v.

LORD

BROWNLOW.

The VICE-CHANCELLOR :

Judgment,
20th August.

The bill in this case was filed by *John William Spencer Brownlow Egerton*, the infant son and heir of the late Lord *Alford*, against the trustees of the will of *John William* late Earl of *Bridgewater* and others; and it prays that the Plaintiff may be declared to be equitable tenant in tail male in possession of the estates thereby devised: and that the trustees may be decreed to account with him for the rents and profits received by them since the decease of Lord *Alford*. The question in the Cause turns, entirely, on the validity of certain clauses contained in the will: and the bill, therefore, states the will at full length. The material Clauses are as follows, &c., &c.*

The bill, after setting out the will and codicils, states that the testator died on the 21st of October 1823, and that, soon afterwards, the executors proved the will and codicils, Lord *Alford* being then in the twelfth year of his age. And it then goes on to state all the facts necessary to raise the point as to the Plaintiff's title, and which are, shortly, as follows: &c. &c.*

All the debts of the testator were duly paid by his executors. On the testator's death, his brother, *Francis Henry*, became Earl of *Bridgewater*; and the trustees, during his life, duly executed the trusts of the ninety years' term. Earl *Francis* died, in February 1829, without having been married and not having been created either Duke or Marquis of *Bridgewater*; and, thereupon,

* See the statement of the case.

the testator's widow entered on all the estates, being entitled as equitable tenant for life in possession. Sir *Charles Long*, after the testator's decease, was created Lord *Farnborough*; and *Amelia* his wife, called in the will, Dame *Amelia Long*, died in June 1837 without leaving issue; and, on the happening of that event, Lord *Alford*, as the eldest son of the late *Sophia Lady Brownlow*, became heir-at-law of the testator. Lord *Farnborough* died in June 1838: and all arrears of the annuity to him and his wife, were duly paid and satisfied up to their respective deaths. Lord *Clive*, one of the trustees named in the will, afterwards became Earl of *Powis*, and died in January 1848; and *Wilbraham Egerton* the elder and *Edward James* now Earl of *Powis*, have been duly appointed trustees of the will, jointly with *John Earl Brownlow*, in the place of *Charles Lord Farnborough* and *Edward Herbert Earl of Powis*; and all the devised estates have been duly vested in the said *John Earl Brownlow*, *Wilbraham Egerton* the elder, and *Edward James Earl of Powis* and their heirs, on the trusts of the will. The testator's widow died in February 1849; and, thereupon, Lord *Alford* entered into possession of all the devised estates, and so continued up to the month of January last, when he died leaving the Plaintiff his eldest son and the heir male of his body. Lord *Alford*, in his lifetime, executed the jointuring power given by the will, by appointing to *Marianne Margaret*, now his widow, a jointure rent-charge of 5000*l. per annum*, for her life, in the event of her surviving him. Lord *Alford*, in his lifetime, and, since his death, the Plaintiff and *Charles Henry Cust* have duly complied with the terms of the will, by taking the name and arms of *Egerton* and obtaining her Majesty's authority so to do. No such title as that of Duke of *Bridgewater* or Marquis of *Bridgewater*, existed at the date of the will

1851.
EGERTON
v.
LORD
BROWNLOW.

1851.-
 EGERTON
 v.
 LORD
 BROWNLOW.

or has since existed; and Lord *Alford* never succeeded to or acquired either of those titles, nor any title whatever save that of Lord *Alford*. No settlement has yet been made of the testator's estates pursuant to the directions of his will. Under these circumstances the Plaintiff insists that he is equitable tenant in tail male in possession of the estates devised by *John William* Earl of *Bridgewater*; for that he is the party to whom the trustees are directed to convey, as being the heir male of the body of Lord *Alford*: and he insists that the subsequent proviso giving the estates away from those heirs male, to the devisees next in remainder, is void, as being contrary to public policy, and so incapable of being enforced in a Court of justice. The Defendants to the bill, are the trustees of the will; Lady *Alford*, who is interested in respect of her jointure; *Charles Henry Egerton*, the brother of Lord *Alford*, who, according to the proviso in question, is now the equitable tenant for life, and his infant son and heir apparent. The prayer of the bill is &c. &c. *

To this bill the trustees and the Defendants, *Charles Henry Egerton*, and *William Tatton Egerton* and his infant son, have put in general demurrers for want of equity, which were very fully argued before me at the sittings after last term.

The Plaintiff, in order to establish his right to the relief which he asks, must make out two propositions: First, that the condition defeating the limitation in favour of the heirs male of the body of Lord *Alford*, is a condition subsequent: and Secondly, that it is a void condition to which this Court will not give effect, as

* See ante, page 480.

being either impossible or contrary to public policy. It is necessary for him to make out that the condition is a condition subsequent; for if it be a condition precedent, it is wholly immaterial whether the act, the doing of which constitutes the condition, is impossible or contrary to public policy, or, even, positively, illegal. If a devise is made to take effect only on the happening of a particular event, then, unless the event happens, there is no gift; and all inquiry as to the character of the act on which the condition depends, is nugatory. Thus, if an estate be devised to *A.* for life, and if, during *A.*'s life, *B.* goes from *London* to *Rome* in three hours, then, on the death of *A.* to *B.* in fee; or if the devise were to *A.* for life, and if, during the life of *A.*, *B.* shall effectually prevent any person from exercising the business of a baker in a particular town, then to *B.* in fee; or to *A.* for life, and if, during the life of *A.*, *B.* shall assault and beat *J. S.* in revenge for an affront he had offered to the testator, then, at the death of *A.*, to *B.* in fee; in the first case, the condition would have been impossible to be performed; in the second, it would, probably, be considered as contrary to public policy; in the third, it would be positively illegal. But still, in none of those cases would *B.* acquire any title to the property devised, unless the conditions were performed. The impossibility, impolicy or illegality of the act, would afford a good reason for its not being performed; but the consequence would be that the devise would fail; not that *B.* would take without performing the condition.

This principle is so clear as to need no illustration, and the only question, therefore, on this part of the case, is whether, on the fair construction of this will, the obtaining, by Lord *Alford*, of the title of Duke or Marquis of *Bridgewater*, is a condition precedent to the vesting of

1851.
 EGERTON
 v.
 LORD
 BROWNLOW.

1851.
 EGERTON
 v.
 LORD
 BROWNLOW.

any estate in the Plaintiff as heir male of his body ; for, if it is, then it becomes immaterial to consider whether the stipulation be or be not impossible or contrary to public policy : and I am clearly of opinion that the condition is a condition precedent.

In determining such a question, we must look, not merely to the particular words in which the condition is expressed, but to the whole context of the will or other instrument in which it occurs ; and if the meaning, as collected from the whole context, is that no estate is to vest unless on a particular act being done or a particular event happening, then the condition, however it may be expressed, is a condition precedent. Now here, Lord *Alford's* interest was an interest for ninety-nine years if he should so long live. No interest could vest in the Plaintiff until the death of Lord *Alford*, his father. At that time, Lord *Alford* either would or would not have acquired the title of Duke or Marquis of *Bridgewater*. If he had acquired it, then the estate of the Plaintiff would arise. If he had not, then the estate of Lord *Alford's* next brother arose. One of the two alternatives must exist at the death of Lord *Alford* ; and, in the one case, the property is to go to the Plaintiff ; and, in the other it is not. The happening of the one alternative or the other, is, therefore, clearly a condition precedent, carrying the estates, in the one event, to the one line, and, in the other event, to the other line. It is true that the expression in the will, is that, on the death of Lord *Alford* without his having acquired the title of Duke or Marquis of *Bridgewater*, the estate thereby limited to the heirs male of his body, " shall cease and be void ;" words which, if strictly construed, are applicable rather to the effect of a condition subsequent than to the effect of a condition precedent : but I have already stated

that, if the condition is, in its nature, precedent, it is immaterial in what words it is expressed. No estate in the heirs male, could, "cease or be void;" because no such estate ever existed. It could only arise at the death of Lord *Alford*; and, at that instant, the event which, according to the expressions of the will, was to put an end to the estate, had already occurred. In fact, therefore, it never existed. The contingency, though described in the will as making void the estate of the heirs male, did not and could not, in strictness, make it void, but would prevent its existing; and so is, to all intents and purposes, a condition precedent.

1851.
EGERTON
v.
LORD
BROWNLOW.

The reason why the testator used the expression, "shall cease and be void," is apparent from the context. The proviso is so framed as to apply to either of two contingencies; first, that which has happened, namely, the death of Lord *Alford* without having acquired the title; and, secondly, the contingency of Lord *Alford* becoming Earl *Brownlow* and not acquiring the title of Duke or Marquis of *Bridgewater* within five years afterwards. In that latter event, the condition would (so far, at all events, as relates to the estate of Lord *Alford*,) be a condition subsequent defeating his estate; and the words, "shall cease and be void," would be strictly proper. This sufficiently explains and justifies the use of the words. But, even if no such explanation could have been given, my view of the case would have been the same. The condition, in the events which have happened, is, in substance, a condition precedent; and so the precise words in which it is expressed, are not material.

It was argued that, as the condition, when applied to this latter contingency, that is, the event of Lord *Alford* becoming Earl *Brownlow* and not, within five years, be-

1851.

EGERTON
v.
LORD
BROWNLOW.

coming Duke or Marquis of *Bridgewater*, is clearly a condition subsequent, therefore, it must be so in the other event also, namely, that which has happened, of Lord *Alford* dying without acquiring the title; for that the same words cannot import a condition subsequent and also a condition precedent. But I can see no difficulty in so moulding the words as to make them meet both alternatives. In the one case, they prevent any estate from arising; in the other, they defeat an already existing interest. In the one, therefore, they import a condition precedent, in the other, a condition subsequent, so far, at all events, as concerns the estate of Lord *Alford*. When the meaning and effect of the words are once ascertained, there is no reason why they should not perform the double function.

Another argument pressed on me as a reason for holding this to be a condition subsequent, was founded on the jointure created in favour of Lady *Alford*. That jointure is, by an express clause in the will, made to cease in case the proviso defeating the limitations in favour of the heirs male of the body of Lord *Alford*, should come into operation; and it was argued that this was, clearly, a condition subsequent as to the jointure, and so must be subsequent throughout. But, even assuming the premises to be correct, and that the condition is a condition subsequent as to the jointure, still the character of the condition remains unaltered so far as it is a condition affecting the estate of the heirs male of the body of Lord *Alford*. It still remains a condition precedent as to that estate, just as if the jointure-clause had not existed.

Being, therefore, clearly of opinion that the Plaintiff has failed to make out the first of the two propositions

he was bound to maintain in order to show that, as heir male of the body of Lord *Alford*, he is entitled to an account of the rents and profits received by the trustees, it might seem that I ought, simply, to allow the demurrers. But this I cannot do, for a reason which I suggested during the argument.

1851.
EGERTON
v.
LORD
BROWNLOW.

The bill is, undoubtedly, framed on the footing of the Plaintiff being equitable tenant in tail male in possession, and so entitled to the rents and profits received by the trustees; and it asks no specific relief except that account, and, as consequent to it, the appointment of a receiver. To no part of that relief is he, in my opinion, entitled. But it appears, from the bill, that no settlement has yet been made by the trustees. Now there is a proviso in the will which declares that, if the Defendant, *John Earl Brownlow*, should be created either Duke or Marquis of *Bridgewater* with a limitation of the title to him and the heirs male of his body by his late wife only, *that* should be deemed equivalent to the acquisition of such title by Lord *Alford*, and the estates should be settled so as to be, thenceforth, enjoyed as if the proviso for determining the estates of Lord *Alford* and the heirs male of his body, had not been contained in the will. If, therefore, this is a valid proviso, the Plaintiff has, clearly, an interest in taking care that the settlement to be made, shall secure to him his rights under this latter proviso, whatever those rights may be.

Is then this proviso valid? The question as to its validity, is, nearly though not quite, the same as that which would have arisen if I had been called on to decide as to the validity of the condition carrying over the estates to the Defendant, *Charles Henry Egerton*, in case Lord *Alford* had become Earl *Brownlow*, and had not, within five

1851.
 EGERTON
 v.
 LORD
 BROWNLOW.

years, become Duke or Marquis of *Bridgewater*; that is, its validity treating it as a condition subsequent. The question then would have been whether a condition defeating a vested estate in case the owner should not acquire a specific title, was good. The question I have now to decide, is whether a condition defeating a vested estate in case a third person does acquire such title, is good. I am, clearly of opinion that it is.

Though this precise question was not argued before me, yet the arguments offered for the purpose of showing the validity of the condition defeating the estate of Lord *Alford* and the heirs male of his body in case he should not become either Duke or Marquis of *Bridgewater*, treating the condition as a condition subsequent, are, for the most part, applicable to the question of the validity of the condition defeating the estate now vested in *Charles Henry Egerton*, in case Lord *Brownlow* should become either Duke or Marquis of *Bridgewater*.

First, it was said such a condition is void, as being impossible; for no man can, at his pleasure or by any exertion of his own, become, or cause another to become a Duke or a Marquis: and it is certain that no estate once vested, can be defeated by a condition that the grantee shall do an impossible act. But the fallacy of this argument is in the meaning which it attributes to the word, "impossible." The doctrine is confined to acts, in the nature of things, impossible, and where, therefore, the condition would, in effect, be repugnant to and nullify the grant. It, certainly, does not extend to cases which may possibly happen, however improbable they may be. All this is made very clear by the instances given in *Comyn's Digest*, title *Condition*, D. 2. "If a condition," Lord Chief Baron *Comyn* says, "be to

do a thing which by no means can be done, it shall be said to be an impossible condition : as to go from *London* to *Rome* in three hours, or to assign a commission of bankrupt ; for the commission cannot be assigned. But, if the condition be improbable and out of his power to do, yet it shall not be said to be impossible : as if the condition be that a married man shall marry such a woman ; for his present wife may die before him. So, though it be out of human power ; as that it shall rain to-morrow." These instances exhaust the whole of this part of the subject, and show that the condition here is not an impossible condition in the sense which makes such a condition void. It is not, in the nature of things, impossible that Earl *Brownlow* should be made Duke or Marquis of *Bridgewater* with the required limitations to particular heirs male of his body. It is not, certainly, in the power of Earl *Brownlow*, or of the Plaintiff to bring about such a result ; but so neither is it in the power of a married man to marry another woman. In order that he may do so, he must survive his wife and obtain the consent of the other woman ; and, whether he shall do so or not, is a matter beyond his power to decide ; and yet such a condition is expressly stated, by Chief Baron *Comyn*, to be good and not void as impossible. If, indeed, the condition had been that the Plaintiff should create Earl *Brownlow* Duke or Marquis of *Bridgewater*, there it would have been void, just as in the case of a condition to assign a commission of bankrupt ; for, by law, this cannot be done. So if the condition were that the grantee should cause it to rain on a given day : this cannot, by any means, be done, and so would be deemed impossible and void.

If then the condition is not void as being impossible, is it void as being against public policy, that is, as

1851.
EGERTON
v.
LORD
BROWNLOW.

1851.

EGERTON

v.

LORD
BROWNLOW.

tending unduly to influence the Crown in conferring or withholding honours? I think not. The condition with which I am now dealing, is a condition defeating the estate of *Charles Henry Egerton* and those in remainder, in case Earl *Brownlow* should become Duke or Marquis of *Bridgewater* with a limitation of the title to particular heirs male of his body. There can be no doubt as to the power of the Crown to grant such a dignity: and I think it must be assumed that it will be granted or withheld according to what may seem just and fitting to the Sovereign, without reference to the interests which may be collaterally affected by the grant. Should such a title be conferred, the effect will be, incidentally, to benefit the heirs male of the body of Lord *Alford*, and, ultimately, in all probability, the Defendant, *William Tatton Egerton*, and his children. Should it be withheld, the effect will be to benefit *Charles Henry Egerton* and his children. But Her Majesty must be taken to stand perfectly neuter and indifferent as between the heirs of Lord *Alford* on the one hand, and *Charles Henry Egerton* and those in remainder after him, on the other. If she should think fit to grant the proposed title to Earl *Brownlow*, the heirs of Lord *Alford* will, incidentally, derive a great benefit. If she should not think fit to make such a grant, *Charles Henry Egerton* and those in remainder after him, will derive the same benefit. But, the Crown being perfectly neuter between those two lines, I do not see that there is any pressure on the Sovereign to make, rather than to abstain from making the grant.

In arguing the question whether the proviso defeating the estate of the heirs male of the body of Lord *Alford*, would be good as a condition subsequent, several cases were suggested to show that the condition might em-

barrass the Crown in the distribution of honours. The Crown, it was said, might desire to grant the title of Duke of *Bridgewater* to some other subject, and so ought not to be hampered by the pressure of the condition now under discussion. Again, Lord *Alford*, himself, might have performed some signal services, which might make it expedient, in the eyes of the Crown, to create him a Duke with some other title than that of *Bridgewater*; and, in such a case, it was said, the condition in this will would tend to fetter the Crown in the free exercise of its prerogative. These arguments, if well founded, would, perhaps, apply to the case which I have to consider, namely, the proviso defeating the estate of *Charles Henry Egerton* and those in remainder, in the event of Earl *Brownlow* becoming Duke or Marquis of *Bridgewater*. But I can attribute no weight to such suggestions. It is a sufficient answer to them to say that, if such improbable circumstances should occur, it must be presumed the Crown would do what was right, without regard to any interests collaterally affected. In the first case, moreover, it may be observed that the Crown might create a second Dukedom or Marquisate of *Bridgewater*, if it should seem expedient so to do. But I do not place any reliance on this.

1851.
EGERTON
v.
LORD
BROWNLOW.

The only other ground relied on by the Plaintiff's Counsel, was that the proviso had a direct tendency to induce Lord *Alford* to use corrupt means for obtaining the proposed object. But this is not so. The object proposed by Lord *Alford* (and the same observation now applies to Earl *Brownlow*) was that he should become Duke or Marquis of *Bridgewater*. To hold that this, necessarily or naturally, imports that he should use corrupt means for attaining the end in view, would be to

1851.

EGERTON

v.

LORD
BROWNLOW.

hold that such means were the necessary or natural steps towards the object in view. *Primá facie*, it must be supposed that such a condition will influence the party affected by it, so to act as to merit the favour of the Crown by rendering eminent services to the state, not by acting dishonourably. If a condition subsequent be bad on this ground, so would a condition precedent: and, if it be bad in the case of the high honours to which, in the present instance, it refers; so must it in all minor cases, where the obtaining any distinction is the condition on which a right is to depend. Nothing, surely, is more common than to devise a living to a son if he enters holy orders. In order to obtain the benefit of such a gift, the son must become, first, a deacon, and then, a priest. The natural course for such a purpose, is, by good moral conduct and competent study, to fit himself for the holy office. But it cannot be stated, as a thing impossible, that he should attain the same object by simoniacally corrupting the Bishop by whom he is to be ordained. Such a possibility, however, could never, surely, be contended to affect the validity of the devise. So in case of a devise to a party in case he obtains a degree in the University, or is called to the Bar, or obtains a commission in the army. In all such cases, it might be suggested, as possible, that the party to be benefited by the devise, might be led to use corrupt means for attaining the proposed end. In these cases indeed, the object might be said to be, in some sort, attainable by the party himself, and not to depend, merely, on the will of a third person as in the case of honours to be conferred by the Crown. Undoubtedly that is so; but, on this branch of the argument, I cannot see that this makes any difference. If the possibility that the condition may lead to the use of corrupt means,

makes the condition void, it must do so whether the attaining the object depends wholly on the will of another, or is more or less dependant on the party himself. The important point is the same in both cases, namely, that the party to be benefited may be led to resort to illegal acts to obtain or to assist in obtaining the proposed object. I think this is not material ; for that, unless the use of corrupt means must necessarily or naturally be understood as those to which the party was intended to resort, the condition is not void merely because it may induce the party to attempt, by unlawful means, to obtain what, by the condition, it was meant he should get by lawful means.

I may here advert to the case of *The Earl of Kingston v. Pierrepoint*, for the purpose only of distinguishing it. There the testator gave 10,000*l.* to be employed in procuring a Dukedom, and the Court held the meaning of the will to be (indeed it was impossible to put on it any other meaning) that the 10,000*l.* should be unlawfully employed in procuring the Dukedom by corrupt means ; and so that the gift was void. I do not doubt of the propriety of that decision ; but, for the reasons I have already stated, I do not think it applicable to the present case.

On the whole, therefore, I am of opinion that the proviso carrying back the estate to the heirs male of the body of the late Lord *Alford* in case *Earl Brownlow* should attain the dignity of Duke or Marquis of *Bridge-water* with the stipulated limitations, is a valid proviso ; and so that the Plaintiff, though he has no estate in possession, has yet an interest in seeing that a proper settlement is made securing to him his right under that proviso. And I think that the bill is so framed as to entitle the

1851.
EGERTON
v.
LORD
BROWNLOW.

1851.
EGERTON
v.
LORD
BROWNLOW.

Plaintiff, under the prayer for general relief, to call on the Court to direct a proper settlement to be made, according to the directions of the will, securing to him his possible interest in the event of Earl *Brownlow* becoming Duke or Marquis of *Bridgewater*.

The result, therefore, is that though, on the death of Lord *Alford*, the beneficial interest in the estates passed to the Defendant *Charles Henry Egerton*, for ninety-nine years if he should so long live, subject to the proviso for defeating that estate, and so the Plaintiff has no right to the specific relief which he asks for ; yet he has a remote possibility of interest, which prevents his bill from being demurrable.

The demurrers, therefore, must be overruled.

CARRICK'S CASE.

IN THE WINDING-UP OF THE GREAT
NORTH OF ENGLAND, YORKSHIRE, AND
GLASGOW UNION RAILWAY COMPANY.

THE attempt to form the above-mentioned provisionally registered Company having failed, and an order having been made for winding it up, the *Master* placed Mr. *Carrick's* name on the list of contributories. Mr. *Carrick* had been a member of the provisional, and also of the executive committee, and had attended several meetings, at which resolutions were passed (some of which he moved, and others of which he concurred in) which sanctioned the appointment of a solicitor, surveyor and traffic-taker. He had also consented to take a share or shares in the Company; and, it having been resolved that one hundred shares should be offered to every member of the provisional committee, and one hundred and fifty to every member of the executive committee, a letter of allotment was sent to him: and, after the undertaking had been abandoned, he, in compliance with a call, paid 30*l.*, or six shillings per share on one hun-

1851 :
26th June
and
4th July.

*Joint-stock
Companies
winding-up Acts.
Contributory.*

The rights and liabilities of the persons concerned in an attempt to form a joint-stock Company which fails, are not affected by the Registration or the Winding-up Acts.

Carrick had been a member of the provisional and of the executive committee of a provisionally registered Company, and a party to resolutions for the

appointment of a surveyor &c. and had consented to take a share or shares; and a letter of allotment of a certain number was sent to him. He had also contributed to a fund raised, *after the abandonment of the undertaking*, for defraying the expenses incurred by the Company. On these grounds, the *Master* placed his name on the list of contributories. But, as there was no distinct evidence of his acceptance of shares, or that expense had been incurred in consequence of the resolutions, or, if any expense had been incurred, that it remained unliquidated or had been liquidated by those who were entitled to call upon him for contribution, the Court ordered his name to be struck off the list, but gave the official manager liberty to apply to the *Master* to restore it, if he could show that the debts remaining to be discharged, were debts for which *Carrick* was liable.

1851.
 CARRICK'S
 CASE.

dred shares, towards the raising of a fund which it was then considered would be sufficient to defray the expenses incurred by the Company.

A motion was now made that Mr. *Carrick's* name might be struck off the list.

Mr. *Bethell* and Mr. *Bagallay* supported the motion.

Mr. *Roxburgh* opposed it.

4th July.

On this day

The VICE-CHANCELLOR delivered the following judgment, in which the argument, and the cases cited in it, are observed upon.

First consider how the rights of the parties would have stood prior to any of the recent statutes. Certain persons enter into a speculation for forming a Company for making and working, or for making a railway. The capital to consist of 150,000*l.*, to be raised in 7500 shares of 20*l.* Many persons agree to take shares and pay deposits on account: but the promoters, afterwards, find it impossible to form the Company, and the project is abandoned. It is clear, on all the authorities as well as on principle, that every person who so made a deposit, would be entitled to recover it back, as money had and received to his use. He paid it on a consideration which has, under the circumstances, wholly failed.

Is this right then affected by the Joint-stock Companies Registration Act, 7 & 8 Vict. c. 110? I think not. The preamble of that Act only states that it is expedient to make provision for the due registration of joint-stock companies during the formation and subsist-

1851.

CARRICK'S
CASE.

ence thereof; and, after complete registration, to invest them with the qualities of corporations, with certain modifications and qualifications; and also to prevent the establishment of any Company not duly constituted according to that Act. There is nothing in this recital which points to any intention of adding to or detracting from the rights of those who may take part in the attempt to form the Company, or who may agree to become shareholders in it when formed. Nor do I find, in the enactments, anything indicating such an intention. The first three sections of the Act are employed in defining certain terms used in the Act, and in explaining to what Companies or partnerships its provisions are meant to apply, and in fixing the period when the Act shall come into operation. Section 4 then imposes, on all parties concerned in forming a joint-stock Company, the obligation of provisionally registering its proposed name and objects, with certain other specified details, before any steps are taken for soliciting the public to become shareholders: and sections 5 and 6 relate to the same subject. Section 7 then provides for the complete registration of the Company, before which it is forbidden to it to carry on its business. That section enters, minutely, into the detail of what is to be registered, and enacts, among other things, that no Company shall receive a certificate of complete registration enabling it to carry on business, until the partnership has been formed by a deed, under the hands and seals of all the shareholders, stating certain particulars required by the Act. The several sections which follow, up to and including section 22, all relate to the subject of this complete registration and the periodical renewals of it to be made from time to time. The next two sections, that is 23 and 24, define

1851.
CARRICK'S
CASE.

what acts may be done during the period of provisional and before complete registration. These acts are confined to the opening of subscription lists, the allotment of shares, and the receiving of deposits thereon to a limited amount, and to certain other specified acts necessary for the due formation of the Company. Section 25 then enacts that, on complete registration, the Company which, it must be observed, must have been previously constituted by deed, shall be incorporated, and may proceed in its functions, having previously, in circumstances requiring the sanction of the Legislature, obtained the necessary Act of Parliament. The subsequent sections contain provisions as to the rights and duties of the shareholders and directors after the Company has come into operation, and also as to the mode of transferring shares and the mode of proceeding at law by or against the Company, and various other clauses to which I do not feel it necessary to advert. It is sufficient to say that there is nothing in the Act, in any respect, altering the relative legal obligations of the persons engaged in forming the Company, and of those who have agreed to become members of it when formed. On the contrary, the Act proceeds on the principle that these two bodies are perfectly distinct. During the period of provisional registration, the persons who are acting are expressly stated, in sect. 23, to be the promoters of the Company, not the persons who have agreed to take shares; and though they, that is the promoters, are authorized to assume the name of the intended Company, coupling with it the words, "registered provisionally," yet this is, obviously, merely an arrangement adopted for the sake of conveniently explaining, to the public, on behalf of what projected body the parties are acting. The parties so acting are

still, according to the express words of the Act, not the Company, but the promoters of the Company.

1851.
CARRICK'S
CASE.

I have been thus particular in examining the effect of this Act, because I know that it has been supposed that its operation was wholly to change the position in which promoters and allottees of shares had previously stood towards each other. I am of opinion that it had no such operation; and so that, after the passing of that Act, no person, in agreeing to take shares, became liable to any of the expenses incurred by the promoters of the scheme in case it should prove abortive; but, on the contrary every such person has the same right since the passing of the Act, as he had before, of recovering back his deposit, as so much money had and received to his use, having been paid on a consideration which has wholly failed. *Walstab v. Spottiswoode (a)* is an authority for this, having been decided long after the passing of the Act.

So matters stood up to the passing of the Winding-up Act. What then was the effect of that Act? Certainly it, in no respect, altered the legal rights or liabilities of any one. Those who had incurred liabilities, remained liable. Those who had acquired rights, retained those rights. The object of the Act was to facilitate the process of liquidation, not to add to or to detract from any existing right. Who then were, at the time of the passing of the Act, the persons liable to pay the debts incurred in the attempt to form the Company? Evidently those who had given the orders under which the debts were incurred, or who had sanctioned the giving of such orders by others. No one could be liable unless either

(a) 15 Mees. & Wels. 501.

1851.
CARRICK'S
CASE.

the creditor could say to him: "My debt was incurred under an order given or sanctioned by you:" or unless the party liable to the creditor could say to him: "I incurred this obligation under your engagement to contribute rateably with me." No person, by agreeing to take shares in the Company when formed, enters into either of these engagements. He neither gives orders for acts to be done in or towards forming the Company, nor authorizes others to give such orders on his account, nor agrees to indemnify or to contribute towards indemnifying those who do so. If that were the true result of his agreeing to become a shareholder, he could not, on the failure and abandonment of the scheme, recover back (as all the cases show he may recover back) his deposit, as money paid on a consideration which has wholly failed. These principles appear to me so clear that, until corrected by some higher authority, I shall feel myself bound to hold, in all these cases, that no one can be put on the list of contributories merely by reason of his having agreed to take, or, which is the same thing, having become an allottee of shares, whether he has or has not paid a deposit.

It was, indeed, argued that, even if a party so situate, was not to be put on the list of contributories as a party liable to pay, yet that he ought to be placed there as a party entitled to receive back the amount of a deposit. But this is an argument evidently resting on no solid foundation. It would go to place, on the list of contributories, allottees who had paid a deposit, and, at the same time, to exclude those who had paid nothing. This would be a very strange result. But, in truth, the whole substratum of the argument fails. The word, "Contributory," by the interpretation clause, includes every member of a Company, and also every other person

1851.
CARRICK'S
CASE.

liable to contribute to the debts and liabilities thereof. The language shows, very clearly, that members are only included because they are, of necessity, liable to contribute. It is true that, though liable to contribute, yet they may, in the result, when the affairs are wound up, become entitled to receive from their co-contributories; because they may have contributed more than a due proportion: but they are placed on the list because the affairs to be wound up are affairs to the losses and liabilities of which they must, if necessary, contribute, though they may, in the result, be recipients and not parties called on to pay anything. Whereas allottees of shares can never be liable to contribute to any of the debts or losses incurred in the abortive attempt to form the Company, and so are neither members nor persons liable to contribute within the meaning of the word, "contributory," as defined in the interpretation clause. Moreover, it is incorrect to speak of allottees of shares as persons who can have, under any circumstances, the right to receive money back as members. They are not members at all. They have no right on the aggregate fund formed by the sum of the deposits. The right of an allottee, when the scheme is abandoned, is a personal right against the party or parties who have contracted with him that, in consideration of his deposit, he should be a shareholder in a Company about to be formed. When the project has been abandoned, he has a right, against those who have so contracted, to recover back what he has so paid. But it by no means follows that the right of every allottee is against the same person or persons; and, even if it is, (which can rarely happen) the right is not a right on any specific fund, but a personal right of action independent of the existence or non-existence of any fund out of which payment can be made. For these reasons I am of opinion that there is no ground whatever

1851.

CARRICK'S
CASE.

for placing, on the list of contributories, any allottee merely because he may be entitled to receive back what he has paid as deposit.

It was suggested, in argument, that, in the view which I have taken in these cases, I am contravening several decided cases. Mr. *Roxburgh* referred, particularly, to the case *Ex parte Barber (b)*, decided by Lord *Cottenham*. I cannot think, however, that there is anything whatever, in that case, at all at variance with what I am deciding. In that case the project was to form an independent line of railway between *London* and *Manchester* direct, with a capital of 5,000,000*l*. The Petitioner, *Barber*, had agreed to take 200 shares, and had signed the subscribers' agreement, thereby expressly authorizing the directors who were engaged in forming the Company, to incur all necessary expenses in making surveys, estimates, contracts, &c., preparatory to the going before Parliament. The scheme proved wholly impracticable and was abandoned. The petitioner, therefore, and the other persons who had signed the subscribers' agreement, and so had authorized the great outlay which had taken place, were liable to be called on by all those who had done work under orders from the directors, and so, taking the law to be that the Winding-up Act applies to the case of parties associated to form a Company, there could not be the least doubt of the petitioner being a member of that association and so a contributory entitled to petition. Indeed, on this point, no question was raised. The doubt was whether the Winding-up Act applied to the case of a body of persons associated for obtaining an Act of Parliament to make a railway. Vice-Chancellor *Knight Bruce* thought it did not; but

(b) 1 Hall & Twells, 238, and 1 Macn. & Gord. 176.

Lord *Cottenham* decided that it did. Assuming that to have been well decided, there could be no possible doubt as to the petitioner being properly to be treated as a contributory. He, by signing the subscribers' agreement, had directly authorized the expenditure the liabilities in respect of which were sought to be wound up. The decision, therefore, does not touch the present case. The petitioner was a contributory, not because he was an allottee of shares, but because he had expressly authorized the expenses incurred.

1851.
 CARRICK'S
 CASE.

I was then referred to two cases before Vice-Chancellor *Knight Bruce*, *Ex parte Hollinsworth (c)* and *Ex parte Capper (d)*. In the former case the petitioners were certainly to be treated as contributories. An action had been brought against them, and a verdict recovered for a sum of 214*l.*, part of the expenses incurred in forming the Company. When, therefore, it had once been decided that an association of persons engaged in an abortive attempt to form a Company, was liable to be wound up under the Act, the right of the petitioners to be treated as contributories, was clear. The judgment against them proved that they were some of the persons who had incurred expense in respect of which they were entitled to call for contribution from those who had concurred with them in the acts which had created their liability. The other case, *Ex parte Capper*, can hardly be cited as an authority. The petitioner who sought to obtain a winding-up order, had never seen the accounts; and all which the *Vice-Chancellor* did, was to make an order the effect of which was to obtain for him an inspection of the accounts in order that he might then decide what course he would pursue. The order must,

(c) 3 De Gex & Smale, 7.

(d) *Ibid.* 1.

1851.
 CARRICK'S
 CASE.

according to *Ex parte Pocock* (e), in conformity to which it was framed, have been made by consent, and it can hardly be cited as a case establishing any general principle.

Some stress was laid on the circumstance that, in the Act passed on the same day with the Joint-stock Companies Registration Act, for enabling Joint-stock Companies to be made bankrupt, (I mean the 7 & 8 Vict. c. 111) the provisions therein contained are, by section the first, expressly made applicable to Companies or bodies of persons registered either provisionally or completely. No doubt such is the language of the Act; and it is very difficult to ascertain, with distinctness, what is its precise meaning. The subsequent clauses seem all to point to formed Companies. Sections 5 and 6 refer to judgments recovered and decrees pronounced against the Company or any person duly authorized to be sued as a Defendant on behalf thereof, which is inapplicable to a Company only in the course of formation. Again, by sect. 25, the Court of Bankruptcy before which any *fiat* against any Company is prosecuted, is directed to report, to the Board of Trade, the circumstances which have led to the failure of the Company, and then, by sect. 26, the Queen is, thereupon, on the recommendation of that Board, authorized to make void all the powers and privileges of the bankrupt Company, whether created by letters patent or Act of Parliament: provisions obviously inapplicable to any Company not completely registered. The whole scope and frame of the Act lead, I think, irresistibly to the conclusion that the words "provisionally registered," in the first section, crept into the clause *per incuriam*. But if this is not a legiti-

(e) 1 De Gex & Smale, 731.

mate mode of dealing with the subject, then I can only say that, whatever anomalies may be the consequence of the enactment, it must be held that bodies of persons associated for forming a Company which is afterwards abandoned, are within the Act, and so liable to be made bankrupt. But I cannot infer, from thence, any intention to alter the relative situation of those who are attempting to form a Company, and those who have agreed to become members of it when formed.

1851.
CARRICK'S
CASE.

As to the special circumstances of *Carrick's case*, there is nothing warranting the placing of his name on the list of contributories without showing what the expenses are for winding up which he is to be made liable. No doubt there is strong evidence to show, as matter of fact, that he sanctioned the employment of the solicitor, surveyor, and traffic-taker: but, before his name is placed on the list of contributories on the ground of such sanction, it must be shown that, under the authority so given, expenses were incurred, and that the same either remain unliquidated, or have been liquidated by those who were liable jointly with *Carrick*, and who, therefore, now are entitled to call on him for contribution. Nothing of this sort appears.

I do not think that *Upfill's case* in the House of Lords, governs this case; because I cannot discover any final agreement, by *Carrick*, to accept shares allotted to him as a committeeman. It was, from the very beginning, arranged that one hundred shares should be offered to each member of the provisional committee, and one hundred and fifty to each member of the executive committee; but I cannot find any evidence of distinct acceptance of either one hundred or one hundred

1851.
CARRICK'S
CASE.

and fifty. On the contrary, when the scheme was abandoned, *Carrick*, "*causa pacis*," as I interpret his acts, agreed to pay 30*l.* as a contribution on one hundred shares towards winding up the concern. Whereas, if the original resolution had been acted on, he would have been bound to pay on one hundred and fifty, and not on one hundred shares. I cannot treat this as anything more than a willingness to pay something, in order, thereby, if possible to extricate himself and those engaged with him, from the difficulties in which they found themselves placed.

-The result will be that Mr. *Carrick's* name must be withdrawn from the list: but the official manager may apply to the *Master* to restore it, if he can satisfy the *Master* that the debts and liabilities remaining to be wound up, are debts and liabilities to which Mr. *Carrick* has, by his conduct on the committee, made himself liable.

KEMP v. SOBER.

IN December 1848, the Plaintiff *Frances Kemp* being seised in fee of two houses adjoining each other and severally numbered 22 and 23, in *Sussex Square, Kemp Town* near *Brighton*, conveyed Number 23 to the Defendant *Ann Sober* in fee; and by a deed of even date with and reciting that conveyance, *Ann Sober*, for herself, her heirs, executors, administrators and assigns covenanted with the Plaintiff her heirs and assigns, that she, her heirs and assigns, would, at all times thereafter, keep the area in front of Number 23 enclosed with open iron palisadoes as therein mentioned, and would, at all times thereafter, paint or cause to be painted the outside wood and iron work of it as therein mentioned, and would not, at any time thereafter, alter or suffer to be altered the then present elevation of it, or put or suffer to be put any shop-window in any part of it, or *carry on any trade business or calling whatever in or upon any part of it, or otherwise use or suffer the same to be used to the annoyance, nuisance or injury of any of the houses at Kemp Town*; and that the several covenants thereinbefore contained, should run with the conveyance and the hereditaments thereby conveyed to *Ann Sober* her heirs and assigns and be a perpetual charge thereon, and should run with the land and hereditaments some time since laid out and called *Kemp Town*, and should pass therewith; and that the Plaintiff, her heirs and assigns, should, for ever, have the benefit thereof to compel and enforce the observance and performance of the aforesaid covenants on the part of *Ann Sober*, her heirs and assigns.*

1851 :
13th May.

Covenant.
School.
Waiver.

The owner of an estate covered it with houses, and sold some of them subject to a covenant not to carry on any trade, *business or calling*, therein, or to otherwise use or suffer the same to be used, to the annoyance, nuisance or injury of any of the houses on the estate.

Held that the carrying on of a girl's school in one of the houses, was a breach of the covenant; and that the covenantee had not waived the benefit of the covenant, though he had permitted other houses held under the like covenant, to be used as schools.

* *Sic.*

1851.

KEMP
v.
SOBER.

Ann Sober having agreed to let Number 23 to *Mary* and *Sarah Wilmshurst* for the purpose of a ladies' school being opened and carried on therein, the Plaintiff, who owned and resided in Number 22, filed a bill against *Ann Sober* and *Mary* and *Sarah Wilmshurst*, alleging that the carrying-on of a school in Number 23, would be a considerable annoyance to her, and a serious injury to Number 22, and would considerably lessen the value of it; and praying for an injunction to restrain the Defendants from carrying on or permitting or suffering a school to be carried on in Number 23, and from using it or permitting or suffering it to be used in any manner contrary to the covenants, stipulations and restrictions contained in the deed of covenant; and to restrain *Ann Sober* from granting a lease of Number 23 to the other Defendants, or either of them, authorizing or permitting them or either of them to carry on the business of a school therein, or to use the same contrary to the covenants, stipulations and restrictions aforesaid.

A motion was now made for the injunction.

It appeared from affidavits made in opposition to the motion, that the Misses *Wilmshurst* intended to take only 20 young ladies, whose education required to be finished, and that *T. R. Kemp*, Esq. the Plaintiff's late husband, (who died in 1844, and under whose will the Plaintiff claimed the houses) had agreed to sell Number 23 to the Plaintiff, "subject to a deed of covenant to be entered into by the Plaintiff, to contain the same stipulations and restrictions as were contained in the deeds of covenant entered into by the other purchasers of houses in *Kemp Town*;" and that the conveyance to *Ann Sober* was made in obedience to the decree in a suit for the specific performance of that agreement, instituted by *Ann Sober*

against the Plaintiff, after Mr. *Kemp's* death. It further appeared that Mr. *Kemp* had occupied Number 22 for many years, and that, in 1838, when he vacated it, he let it, and also Number 21, to a person who, for several years, used those houses for a boys' school ; and that many schools for male and female pupils, had been permitted and carried on during Mr. *Kemp's* lifetime, and still were permitted and carried on in *Sussex Square* and other parts of *Kemp Town*, notwithstanding the persons to whom Mr. *Kemp* had sold the houses in which they were carried on, had entered into covenants with him similar to that which *Ann Sober* had entered into with the Plaintiff.

1851.

KEMP

v.

SOBER.

Mr. *Temple* and Mr. *J. H. Taylor*, for the Plaintiff, contended that the carrying on of a school, was a *business* within the meaning of the covenant: *Doe v. Keeling* (a).

Mr. *Malins* and Mr. *Piggott*, for Mrs. *Sober*, said that the school in the case cited, was a boys' school and a great number of boys were educated at it ; but in this case, the school was a girls' school, and only a few pupils were intended to be taken ; therefore, no annoyance could arise from it : that all the houses in *Sussex Square* and other parts of *Kemp Town* which Mr. *Kemp* had sold, were subject to covenants similar to that entered into by Mrs. *Sober* ; and Mr. *Kemp*, whose assign the Plaintiff was, permitted several of them to be used as schools, and actually let Numbers 21 and 22 for a boys' school ; therefore he had waived the covenant: *The Duke of Bedford v. The Trustees of the British Mu-*

(a) 1 Mau. & Selw. 95.

1851.

KEMP

v.

SOBER.

seum (b); and that the Plaintiff ought to have waited until she had actually suffered annoyance from the school : *The Att.-Gen. v. The Manchester and Leeds Railway Company* (c), *Elmhirst v. Spencer* (d).

Mr. *Willcock* appeared for the Misses *Wilmshurst*.

Mr. *Temple* replied. •

THE VICE-CHANCELLOR :

It was decided, in *Doe v. Keeling*, that the keeping of a boys' school was a business within the meaning of the covenant in that case, and I am of opinion that the keeping of a girls' school is a business or calling within the meaning of the covenant in this case. If, as the affidavits state, Miss *Wilmshurst* intends to take no more than twenty young ladies, still her neighbours will suffer annoyance not only from their practising music and dancing, but from their relations and friends continually calling upon them.

It was said that this case comes within the principle of those cases in which the Court has refused to interfere because no damage has been actually sustained. But a person who stipulates that her neighbour shall not keep a school, stipulates that she shall be relieved from all anxiety arising from a school being kept; and the feeling of anxiety is damage.

It was also said that the Plaintiff was not entitled to ask this Court to interfere on her behalf, because Mr. *Kemp*, whose assign she is, permitted several of the

(b) 2 Myl. & Keen, 552. (c) 1 Railway Cases, 436.

(d) 2 Macn. & Gord. 45.

houses in *Kemp Town*, to be used as schools; and the case of *The Duke of Bedford v. The Trustees of the British Museum*, was cited in support of that proposition. There, an ancestor of the Duke of *Bedford*, having a mansion-house, called *Southampton House*, and land consisting of open fields, in the district of *Bloomsbury*, sold and conveyed a piece of the land, being the site on which the *British Museum* now stands, to Mr. *Montagu*, and Mr. *Montagu* entered into a covenant, with the vendor, not to erect any buildings on it, except a mansion-house, (which was afterwards called *Montagu House*,) and suitable offices. Many years afterwards, *Montagu House* was purchased for the *British Museum* and vested in trustees. In 1822, the trustees being about to erect certain buildings in the gardens of the house, which the Duke considered would be an infringement of the covenant, he applied, to this Court, for an injunction to restrain them from proceeding to erect those buildings. The application was made, first, to Sir *John Leach*, V. C.; who ordered a case to be stated for the opinion of a Court of Law as to whether the Duke could maintain an action on the covenant. The Duke was dissatisfied with that order, and appealed from it. The appeal was heard by Lord *Eldon* with the assistance of Sir *Thomas Plumer*, M. R.; and those learned Judges were of opinion that the covenant was entered into with reference to the estate of the *Bedford* family, while it remained in the state in which it was when the covenant was entered into; and that the Duke, who had pulled down *Southampton House* and covered the site of it and the adjoining fields with houses, had, by so doing, rendered it immaterial whether the covenant was broken or not, or, as Lord *Eldon* observed, had destroyed the purpose for which the covenant was inserted in the conveyance to Mr. *Montagu*;

1851.

KEMP
v.
SOBER.

1851.

KEMP

v.

SOBER.

and, therefore, that it was unreasonable in him to attempt to enforce the covenant: and, consequently, that a Court of Equity ought not to interfere, in any manner, on his behalf, but ought to leave him to assert his right, if he had any, in a Court of Law.

There is an obvious distinction between that case and the present one: for a private house which has been converted into a school, becomes, again, a private house, as soon as it ceases to be used as a school. But land which, like the *Bedford* estate, has been once covered with buildings, can never become pleasant open fields again.

My opinion therefore, is that the Plaintiff is entitled to the injunction which she asks.

MYERS v. WATSON.

ON the 1st of November 1844, *William Potter* who, not long before, had purchased an estate called the *Flaybrick* estate, situate partly in the township of *Birkenhead* and partly in the township of *Claughton* in *Cheshire*, on a building speculation, agreed to sell two portions of it to *R. and H. Watson*, one containing 4482 square yards, and the other containing 4680 square yards, for 5872*l.* 16*s.* and 2340*l.* respectively. The purchase-money was to be paid by certain instalments; the last of which was to be paid on the 1st of November 1847. The pieces of land were described, in the agreement, as being bounded, on the south, by a road or street called *Bailey Street*, on the north, by *Norman Street*, and, on the east and west by two intended new streets of certain widths; and *R. and H. Watson* agreed to pay, to *Potter*, one moiety of the expense of making a sewer under so much of the streets on the north, east and west sides of the first piece of land, and under so much of all the sides of the second piece, as was co-extensive with the lands thereby contracted for, and one moiety of the expense of forming and laying down such part of the same streets, with rock and macadam, and also of forming and laying down the parapets or footwalks of such part of the same streets, with kerb and channel stones, and of keeping the same streets, sewers, footwalks or parapets in good repair until the same should be adopted by the township of *Claughton* or of *Birkenhead*; and also to make, form and lay down, through the centre of the first piece of land and extending from *Bailey Street* to *Norman Street*, a public high-

1851:

18th, 19th,
and 20th
March and
16th April.*Specific performance.**Vendor and purchaser.*

A. agreed to purchase part of an estate, on the faith of representations made to him by the vendor's agent, that the vendor would do certain acts on the remainder of the estate. Those acts, however, were not done; in consequence of which, the value of the land purchased, was considerably diminished. A bill for specific performance, filed by persons claiming under the vendor, was dismissed with costs.

1851.

MYERS

v.

WATSON.

way or street twelve yards wide, with rock and macadam, and also to form and lay down the parapets and footwalks of such street with suitable kerb and channel stones, and to keep such street and footwalks in good repair until the same should be adopted by the township ; but *R. and H. Watson* were not to be required to make such street and footwalks, until *Potter* should have made a similar public highway or street, with footwalks immediately opposite, through other land of his to the westward, and extending, in a direct line, from *Bailey Street* to the turnpike-road leading to *Upton*.

On the 1st of May 1845, *Potter* agreed to sell two other portions of the *Flaybrick* estate, to the same gentlemen, for 8225*l*. One of those portions was situate in *Birkenhead* and contained 6060 square yards. The other was situate partly in that township and partly in *Claughton*, and contained 10,530 square yards. One was described as bounded by *Bailey Street* and new streets and intended streets of certain widths, and the other, as bounded by a certain turnpike-road and new streets : and the purchasers were to have the use of the said streets or intended streets, and of all other streets then made or thereafter to be made over *Potter's* land adjoining or contiguous to the land thereby contracted for : and *Potter* agreed, forthwith, to make sewers under the streets surrounding those pieces of land, and to form and lay down the same with rock and macadam, and also to make and lay down the parapets or footwalks thereof with suitable kerb or channel stones ; and *R. and H. Watson* agreed to keep such streets, sewers and footwalks or parapets, after the same should have been so made and formed, in good repair, until they should be adopted by the *Birkenhead* commissioners. By each of the agreements, the purchasers agreed not to make or suffer to be made any

lime-kiln, soapery or tan-yard on the pieces of land therein comprised, nor to carry on or suffer to be carried on any offensive trade or business thereon ; nor to erect any court or courts of houses thereon ; nor to permit the cellar of any house to be erected thereon, to be used as a separate dwelling.

1851.
 MYERS
 v.
 WATSON.

In August 1847, *Potter* mortgaged the whole of the *Flaybrick* estate to the Earl of *Devon* and others, for 40,000*l.* In April following he became bankrupt ; and in May 1849 (at which time the estate remained nearly in the same state as it was in when the agreement was entered into) his assignees filed a bill to compel *R.* and *H. Watson* to perform the agreements.

The *Watsons* insisted that they were not bound to perform the agreements, because they were induced to enter into them by representations made to them by *William Cole*, (who was *Potter's* agent and with whom they treated for the purchase of the pieces of land) that *Potter* intended, with all reasonable despatch, to lay out the whole of the estate in streets and to build houses upon it, and to erect a church on a certain part of it, according to a plan which *Cole* showed them ; but that none of those acts had been done, and the omission to do them rendered the value of the pieces of land vastly inferior to the sums which the Defendants had agreed to pay for them.

Evidence was entered into on both sides ; and, on the Cause coming on to be heard,

Mr. Bethell and *Mr. Bigg*, for the Plaintiffs, cited *Herriot's Hospital v. Gibson (a)*, *Squire v. Campbell (b)*,

(a) 2 Dow. 301.

(b) 1 Myl. & Cr. 459.

1851.

MYERS

v.

WATSON.

The North British Railway Company v. Todd (c),
Higginson v. Clowes (d) and *Croome v. Lediard* (e).

Mr. Rolt and Mr. Kinglake, for the Messrs. Watson, cited *Underwood v. Hitchcox* (f), *Twining v. Morrice* (g), *The Marquis Townshend v. Stangroom* (h), 1 Sugd. Vendors, 10th edition, page 228, *Mortlock v. Buller* (i), *Mason v. Armitage* (k), *Clarke v. Grant* (l), *Harnett v. Yielding* (m), *Beaumont v. Dukes* (n) and *Neap v. Abbott* (o).

Mr. Cottrell appeared for Potter's mortgagees.

The VICE-CHANCELLOR :

16th April.

This suit was instituted by the Plaintiffs as the assignees of *William Potter* a bankrupt, for the specific performance of two contracts, entered into by the Defendants, for the purchase of land at *Birkenhead*, from *William Potter*, before his bankruptcy. The first contract bears date the 1st November 1844, and, by it, the Defendants *R.* and *H. Watson* were to pay 5872*l.* 16*s.* for the piece of land first described, and 2340*l.* for the piece of land secondly described, that is, 8*s.* per square yard for the first, and 10*s.* per square yard for the second: and the streets adjoining were to be made at the joint expense of *Potter* and the *Watsons*. The purchase-money was not to be fully paid until the end of three

- | | |
|--------------------------------------|---|
| (c) 12 Cl. & Finn. 722. | (i) 10 Ves. 292, see 313. |
| (d) 15 Ves. 516; 1 Ves. & Beam. 524. | (k) 13 Ves. 25. |
| (e) 2 Myl. & Keen, 251, 293. | (l) 14 Ves. 519. |
| (f) 1 Ves. Sen. 279. | (m) 2 Scho. & Lef. 549. |
| (g) 2 Bro. C. C. 326. | (n) Jacob, 422. |
| (h) 6 Ves. 328. | (o) 1 Purton Cooper's C. temp. Lord Cottenham, 382. |

years, that is, in November 1847. The second contract bears date, the 1st of May 1845, and it was a contract for the purchase of similar pieces of land, at the rate of 10s. per square yard. The streets adjoining those pieces of land, instead of being made at the joint expense, were to be made at the sole expense of the vendor. Under that contract also the purchase-money was not to be fully paid until the end of three years, that is, on the 1st of May 1848. Deposits were paid on each contract, and interest was regularly paid on the balances remaining due up to the 1st of May 1847. On the 20th of April 1848, *Potter* became bankrupt; and the Plaintiffs, as his assignees, filed the bill in this Cause on the 1st May 1849. The prayer is in the usual form.

1851.
 MYERS
 v.
 WATSON.

The right of the Plaintiffs to the relief sought, would be, *prima facie*, of course: but the Defendants resist the Plaintiff's demand, on the following grounds. The land included in the two contracts, forms part of an estate adjoining the town of *Birkenhead*, called the *Flaybrick* estate, which was purchased, by *Potter*, on a building speculation, shortly before the first contract was entered into. *Potter*, soon after he had become the owner of the property, had caused a map or plan to be made of it, and had, on such plan, caused a number of streets to be marked out, dividing the whole into lots for building; it being, at that time, thought that the then contemplated docks and other works at *Birkenhead*, would make it a good speculation to cover the land in question with buildings. This map or plan indicated one main street traversing the whole estate from the north-west to the south-east corner, to be called *Bailey Street*; and another main street to run along the north-east side of the estate, to be called *Norman Street*. Besides these two principal streets there were a great number of

1851.

MYERS

v.

WATSON.

streets marked on the map, as intended to traverse *Bailey Street* at right angles ; and two or three others, to run parallel with it. The streets thus designated, divided the whole property into a great number of patches of ground, all intended to be sold in lots for the purpose of their being covered with buildings. The Defendants say that, before they entered into their first contract, this map was frequently shown to them by Mr. *Cole*, who was Mr. *Potter's* agent in the mapping of the estate and in the sale of the lots, and who, certainly had authority to act for him in all negotiations with parties inclined to become purchasers : and they say that they entered into the contracts in question on a building speculation, relying on the assurance of *Cole*, that the scheme of covering the whole estate with buildings according to the map, should be carried into effect. It is admitted that little has been done to carry the plan into effect. Some progress has been made towards the completion of *Bailey Street* and *Norman Street* ; but nothing else has been done : and the Plaintiffs say that they do not intend to do anything which they are not bound to do according to the express terms of the two written contracts between *Potter* and the Defendants. In that state of things, the Defendants say it would not be consistent with the principles of this Court to compel them to perform agreements which they entered into on the faith of representations, made by the agent of the vendor, that certain important acts should be done which, in fact, never have been done, and the omission to do which very materially diminishes the value of the property contracted for.

The rule of equity in these cases, is that a decree for a specific performance is not matter of absolute right, and, therefore, whenever the Court sees that such a

decree might work an injustice, it holds itself at liberty to refuse its aid, and to leave the party to seek his remedy at law. It may be difficult to state, beforehand, all the cases in which the Court will thus withhold its assistance. It certainly will do so whenever there has been anything like fraud or circumvention in procuring the concurrence of the Defendant in the contract sought to be enforced. Indeed, in those cases, even at law, there is, in general, a valid defence. But, without anything amounting to actual fraud, where there has been mistake or surprise on the part of the Defendant, this Court frequently refuses to act, and leaves the Plaintiff to his legal remedy. And I apprehend that one of the most ordinary cases in which this Court thus remains passive, is where, though there is no doubt as to the contract itself, and no doubt as to the Plaintiff's legal right under it, yet the Defendant has been induced to enter into it in consequence of some independent engagement, by the Plaintiff, to do some other act which he has failed to perform. If the Court is satisfied that such independent engagement was made, and that, on the faith of it, the Defendant entered into the contract sought to be enforced, there, if the Plaintiff fails to do that which he has undertaken to do, even though it may have been an engagement incapable of being legally enforced, this Court will leave the Plaintiff to obtain such redress as he may be entitled to at law.

Such being the doctrine of the Court, the point to be ascertained is one of fact. Was there any engagement, on the part of *Potter*, to do anything which he has failed to do, and on the faith of which being done it is reasonable to believe that the Defendants entered into the contracts in question? In order to answer the question, let us first see how the Defendants state their case in

1851.

MYERS

v.

WATSON.

1851.

MYERS

v.

WATSON.

their answer. They say that, during the treaty for the first purchase, *Cole* represented to them that the estate was forthwith to be laid out in streets and otherwise, to be built upon according to the plan; and that, on the plan, was delineated a church to be erected by *Potter*, which would be likely to attract a resident population to the spot, and that *Cole* assured them that the plan would be carried into effect with all reasonable despatch, and that the church would be speedily built. The Defendants then repeat that *Cole* represented to them that it was the intention of *Potter* speedily to carry the plan into effect; and they state, positively, that they entered into the agreement of the 1st of November 1844, on the faith of the representations so made by *Cole*. With reference to the second contract, the Defendants say that *Cole* made the same representations as before, and that they entered into that contract on the faith of those representations, and, more especially, on the faith that the church would be immediately erected for the convenience of persons residing in the houses to be built on the estate. This, I think, is a correct summary of the case made by the answer of the Defendants: and the first point to be decided is what is the fair interpretation of the representations so alleged to have been made by *Cole*, the agent of *Potter*!

It was argued, for the Defendants, that these representations if, in fact, they were made, amounted to a positive engagement that the estate should, either by *Potter* or by others purchasing from him, be covered with buildings according to the plan. I think this is going too far. The Defendant could not have understood, from the general representations of *Potter's* intention to carry the plan speedily into effect, that he meant to do more than to divide the property into lots, according to the plan, to

be sold to any persons ready to purchase on building contracts, and further to do whatever was necessary for the general benefit of the whole speculation and was not to be done by any particular purchaser. What these acts were, is left in some obscurity: but I think it is pretty clear that all parties understood that *Potter* was to form and complete *Bailey Street* and *Norman Street*, and, perhaps, some few of the others. But this is not, in my view of the case, very material: for there is one thing which it is quite clear that, according to the answer, *Cole* represented that *Potter* would do for the benefit of the purchasers; namely, that he would build a church as designated on the plan, in order, thereby, to offer inducements to persons to reside in its neighbourhood, and so present advantages to persons who might be willing to enter on building speculations. Whatever of vagueness there may be in the other representations attributed to *Cole*, there is none in this.

Now, supposing these representations to have been made by *Cole*, I think the Defendants do make out a case showing that this Court ought not to decree a specific performance: for the representation that *Potter* would, with all reasonable speed, proceed to complete *Bailey Street* and *Norman Street*, and to build a church as designated on the plan, would, necessarily, have a material influence in leading parties to purchase plots of ground for building; and, when acting on the faith of those representations, parties have entered into contracts, it would not be consistent with the doctrines of equity, to compel them to perform these contracts at the instance of those who have failed in fulfilling the engagements which they entered into, and on the faith of which the contracts were made.

1851.

MYERS

v.

WATSON.

1851.

MYERS

v.

WATSON.

It only remains to see whether any such representations as are stated in the answer, were, in fact, made : and I think that the evidence of *Cole*, supported, as it is, in material points, by *Brattan*, his clerk, clearly shows that they were made. *Cole*, in answer to the fourth interrogatory, says : "The Defendants *Richard Watson* and *Henry Watson* did, in the latter part of the year 1844, make applications to and inquiries of me respecting the *Flaybrick* estate. The nature and purport of such inquiries were to know the terms on which I would sell them portions of the estate. In every interview I so had with the Defendants *Richard Watson* and *Henry Watson*, the map or plan now produced, marked C, was opened and referred to by us in reference and with a view to a sale, to them, of some portions of the estate. At the various interviews I so had with the said *Richard Watson* and *Henry Watson*, I stated, to them, that it was Mr. *Potter's* intention to lay out the estate in the manner indicated by the said map or plan marked C, and that the same would be intersected and bounded by streets as therein indicated ; and that he would, forthwith, complete and sewer the street called *Bailey Street* on the said plan, and a street twelve yards wide, leading southwardly from *Bailey Street*, between the lots marked 27 and 28 on such plan, and which would communicate with a road bounding *Birkenhead Park*, and that he would, forthwith, complete and sewer a street between lots 6 and 7 on the said plan, leading northwardly to an intended road of thirty-six feet wide, which would open a direct communication between the *Flaybrick* estate and the docks then proposed to be formed in *Wallasey Pool* : and that he would also, forthwith, complete and sewer *Norman Street* marked on the said plan, and the intended road thirty-six feet wide, leading from and in continuation of *Norman Street*, bounding the

south extremity of the estate, and leading into *Tolle-mache Road*: and I also stated to them it was Mr. *Potter's* intention to complete and sewer the other streets marked on such plan, as the land included in such streets was sold off. I also told them that Mr. *Potter* would erect a church upon the site marked for such purpose upon such plan. Such statements and representations were so made by me, to such Defendants, with the view and intention of showing that the *Flaybrick* estate would be enhanced in value by the formation of the streets shown upon such plan, and by the erection of the church. In making such statements and representations I intended to produce, on the minds of the said *Richard Watson* and *Henry Watson*, a belief and impression that the lots of land which they proposed to purchase, and for the purchase of which they were then in treaty with me, would be greatly increased in value when the streets marked upon such plan were completed and sewered, and that they would be very eligible for building purposes. I told them that I thought the lots they were proposing to purchase, would, by those means, be improved in value from 8s. per square yard, which they were to give, to 15s. a yard. I made all the statements and representations which I have mentioned in my answer to this interrogatory, on behalf of the said *William Potter*. I had, at the time I made such statements and representations, authority from the said *William Potter*, to make such statements as to the making and sewerage of the said streets, and as to carrying out such plan and the building of the church, and to make such statements and representations as the agent of the said *William Potter*." Then, with reference to the second contract, Mr. *Cole* says, in answer to the sixth interrogatory, in effect, that he made the same representations over again to the Defendants *R. and H. Watson*. Then *Brattan, Cole's*

1851.

MYERS
v.
WATSON.

1851.

MYERS

v.

WATSON.

clerk, in answer to the thirteenth interrogatory, speaks pretty nearly to the same effect. He says: "I have frequently been present at interviews between *William Cole* and the Defendants *Richard Watson* and *Henry Watson*, after the contract marked D was entered into, and before the contract marked E was entered into, (though I cannot say it was with reference to the contract marked E being entered into) at which Mr. *Cole* stated, to such Defendants, that it was Mr. *Potter's* intention to build a church on the plot of land shown, on the map or plan marked C, as appropriated for the purpose; and likewise that it was Mr. *Potter's* intention to make all the streets as laid down on the said plan." Then again *Cole*, speaking of the conduct of the parties after both contracts had been entered into, deposes as follows in answer to the eighth interrogatory: "Subsequently to the month of May 1845, more particularly in the year 1846, the Defendants, *Richard Watson* and *Henry Watson*, made many applications to me in respect to the streets by which it was proposed that the *Flaybrick* estate was to be intersected, as shown in the map or plan marked C now produced and shown to me. They requested that Mr. *Potter* would, forthwith, make the streets according to his agreement; as the land was entirely out of the market for want of the streets, and they were prevented from making any sales of the parts they had purchased: and they stated that they would pay no interest on the unpaid purchase-money, unless they were, forthwith, completed. I told the said *William Potter*, personally, from time to time, the application which those Defendants were continually making to me: and I urged upon him the necessity of the streets being made, as the parties were suffering for the want of them, and could not bring the land purchased by them, into the market for building purposes. Mr. *Potter* told me

that it was not convenient to him, at that time, to make the streets. In answer to the applications which the Defendants, *Richard Watson* and *Henry Watson* were continually making to me on the subject of the formation of the streets, I put them off as well as I could, and made general promises that they should be finished as soon as possible."

1851.
 MYERS
 v.
 WATSON.

It seems to me impossible, on this evidence, to come to any other conclusion than that the Defendants are stating their case truly, when they say that they entered into the contracts relying on assurances, made to them by *Cole*, that *Potter* would, himself, forthwith make certain of the larger streets for the common benefit of all the purchasers, and also, as an inducement to speculators to build, that he would, himself, at his own cost, erect a church. This being so, I think that the Plaintiffs, representing *Potter* and failing to do what *Cole* had engaged he would do, are not entitled to relief in this Court.

His Lordship after observing upon some correspondence which took place between the parties and their solicitors, at the close of the year 1847, and which had been much relied on by the Plaintiff's Counsel as showing that the defence made by the Defendants, was an afterthought, concluded as follows :

I see nothing in what took place leading to the conclusion that the Defendants are untruly representing their case, when they say that they entered into the contract on the faith of the representations made by *Cole*; or that they waived any objection arising out of the non-fulfilment of what *Cole* then undertook should be done. On the whole, therefore, I am of opinion that it is satis-

1851.

MYERS

v.

WATSON.

factorily made out that the vendor, by his agent, induced the Defendants to enter into these contracts, on an assurance that certain things material to their interests should be done by him : and that, having failed in performing what he had so engaged to do, his assignees are not entitled to relief in this Court ; and so that their bill must be dismissed, with costs.

1851 :
21st and 26th
March.

*Legacy.**Interest.**Will.**Construction.*

HUMPHREY v. HUMPHREY.

SAMUEL HUMPHREY, late of the city of *London*, made his will dated the 23rd of August 1844, and thereby, after reciting that he was carrying on business with *Sutton Simpson* and *Charles Humphrey* as isinglass merchants, and that, under a deed of co-partnership entered into by the firm on the 2nd day of March 1841, he was entitled to a certain share or interest in the business, and that, in the deed, was contained a proviso that, in case of his death before the determination of the co-partnership of seven years, the co-partnership should continue, between his surviving partners and his executors, for a further period of six, nine or twelve calendar months, as might be by them agreed upon, to settle and adjust the co-partnership accounts and estate ; and that, until such co-partnership

Testator gave the produce of his share and interest in his co-partnership business, to his wife, and also the interest of the capital sum of 1000*l.* for her sole use and benefit and free from the debts or control of any husband she might marry,

and her receipt to be a sufficient discharge to his executors ; and he gave all his furniture, plate, &c., to her *absolutely*.

Held that the gift of the interest of the 1000*l.* passed the principal.

should be determined, the surviving partners were to pay, unto such person as he should direct, the sum of 4*l.* weekly; he gave and bequeathed the said sum of 4*l.*, weekly unto his wife, *Sarah Ann Humphrey*; and afterwards expressed himself in the following words: "As to the produce of my share or interest in the said co-partnership business, monies and premises, when the same shall be fully adjusted or disposed of, I direct that the produce thereof, and I give and bequeath the same unto my said wife, *Sarah Ann Humphrey*; and I also give and bequeath, to my said wife, *the interest of the capital sum of 1000*l.*, for her sole use and benefit and free from the debts and control of any husband she may marry, and her receipt alone shall be a sufficient discharge to my executors.* And I also give to her all my household furniture, plate, linen and china, *absolutely*: and to my daughter, *Ann Fanny*, now an infant, the sum of 500*l.* I also give and bequeath, unto my sister-in-law, *Clara Humphrey*, and my brothers-in-law, *Frederick Humphrey* and *Horatio Humphrey*, and to *Samuel* the son of *John Humphrey*, the sum of 100*l.* each, to be severally paid to them when and as they attain the age of twenty-one years. All the rest and residue of my personal estate and effects, subject to the payment of my just debts and funeral and testamentary expenses, I give and bequeath unto my brothers, *Charles* and *John Wrainch Humphrey*, equally between them."

1851.
HUMPHREY
v.
HUMPHREY.

The testator died on the 9th of October 1844. *Charles Humphrey*, one of his brothers and residuary legatees, died in January 1849, having bequeathed his residuary personal estate to *John Wrainch Humphrey*, and appointed him and *Benjamin Humphrey* his executors. *J. Wrainch Humphrey* died in May 1849, intestate. The Plaintiff, *Jane Humphrey*, was his adminis-

1851.
HUMPHREY
v.
HUMPHREY.

tratrix. The Defendants to the bill were *Benjamin Humphrey*, and the testator's widow, and *Joseph Billings*, her second husband. The question was whether the bequest, in the testator's will, of *the interest* of the capital sum of 1000*l.* to his wife, for her sole use and benefit, &c., gave her the absolute, or only a life interest in that sum.

Mr. *Malins* and Mr. *Swinburne*, for the Plaintiff, whose interest it was to contend that Mrs. *Billings* took only a life interest in the 1000*l.*, said: It has been, for some years, adopted as a rule that an unlimited bequest of the interest or annual produce of personal estate, carries the principal, unless indications of a contrary intention can be discovered in the will: and such indications may be collected from any matter capable of affording an inference of intention not to give the principal, however extraneous to the particular bequest itself; such as other dispositions in the will quite foreign to it; or from the general character and effect of the whole will. *Rawlings v. Jennings* (a), *Clough v. Wynne* (b). Those cases show the general nature of the circumstances from which the inference of intention may be drawn, and that any matter capable of suggesting an inference of intention not to give the principal, may be resorted to. Many such matters present themselves in this will. First, it appears, from the will itself, that the testator was a merchant carrying on business in the city of *London*; therefore, he necessarily knew the difference between interest and capital: secondly, the testator first makes an absolute bequest to his wife of the produce of his partnership property. Then, by another clause, he gives her the interest of the

(a) 13 Ves. 39.

(b) 2 Madd. 188.

capital sum of 1000*l.*: and, immediately afterwards, he proceeds to give her his furniture, &c., and this he not only gives by a fresh clause, but he emphatically declares that he gives it her absolutely, just as a man who, by the immediately preceding bequest, had given only a partial interest, naturally would do. Thirdly, inasmuch as the testator must be taken to have known that the legacy, if of principal, would be payable at the end of one year from his own death, the disposition to his wife's separate use, shows that he must have contemplated her marrying again before the expiration of a year from his death; which it seems hardly reasonable to suppose. The more natural interpretation is that the separate use was intended, by the testator, to extend to the whole life of his wife, and to guard against marriage at any time. Fourthly, the testator proceeds to give two legacies of 500*l.* and 200*l.*, and he does not give these sums as the interest of the capital sums of 500*l.* and 200*l.*, nor as capital sums of 500*l.* and 200*l.*, but, simply, as sums of 500*l.* and 200*l.*; from which clearly arises an inference that, by the gift of the interest of the capital sum of 1000*l.*, he must have meant something different from the gift of 1000*l.*

1851.
 HUMPHREY
 v.
 HUMPHREY.

The learned Counsel then reviewed all the cases in which a gift of income had been held to pass capital, and contended that the decisions in such of them as were subsequent to *Elton v. Shephard* (c), and *Philips v. Chamberlaine* (d), had proceeded upon a hasty and imperfect view of the grounds upon which those cases had been decided.

Mr. *Stuart* and Mr. *Rudall*, for the Defendant *Ben-*

(c) 1 Bro. C. C. 532.

(d) 4 Ves. 51.

1851.
 HUMPHREY
 v.
 HUMPHREY.

jamin Humphrey, whose interest was the same as the Plaintiff's, took a distinction between a bequest of the dividends of a sum of stock, and a bequest of the interest of a sum of money, and relied on the expression in the will: "and her receipt alone," as implying that the bequest with reference to which those words were used, was intended for the personal and individual benefit of the legatee.

Mr. Bethell and *Mr. Cole* appeared for *Mr. and Mrs. Billings*.

The VICE-CHANCELLOR:

An unlimited gift of the income of a fund, has been held to pass the capital too frequently for me to decide otherwise.

It is true that the gift, here, is followed by the words: "for her sole use and benefit;" but those words, or words equivalent to them, have been held insufficient to limit the interest of the legatee to an interest for life. Then a distinction was pointed out between the gift in question and that of the testator's furniture &c., which also he bequeaths to his wife, adding, however, the word 'absolutely.' But I think it better to decide consistently with a rule which every one can understand, than to decide otherwise upon so slender a ground.

I may add that the circumstance of the word, 'receipt,' being used in the singular number, rather shows that the legatee might give one receipt for the whole sum.

Declare that *Mrs. Billings* is entitled to the 1000*l.* for her separate use, and direct it to be paid to her on her giving her separate receipt for it.

HOMER v. GOULD.*

THIS was a suit for the administration of the estate of a testator, whose will was dated the 3rd of April 1790, and was, in part, as follows :

1851 :
29th April.
Will.
Construction.

“ And I do by this my will direct that the interest, dividends and annual proceeds of all the residue of my said estate shall, from the time of my decease, be divided into eleven equal parts or shares, and that my said trustees shall pay and divide the same, yearly, unto and amongst my children, *John Habbin*, *Sarah* the wife of *W. Greenfield*, and *Mary* the wife of *John Randall*, during their respective lives, in the following portions ; namely ; Unto my son, the said *John Habbin*, four shares ; unto my daughter, the said *Sarah Greenfield*, four shares, and unto my daughter, *Mary Randall*, three shares of the said interest, dividends and annual proceeds : and, from and after the decease of any one or two of my said children until the decease of the survivor of them, I direct that such of the said shares as belonged to the parents, respectively, in their lifetime, shall go unto and be equally divided amongst all the children, (except *John*

Testator directed the dividends of his residue to be paid to his three children *A. B. and C* in certain shares, and that, after the decease of any one or two of them until the decease of the survivor, the shares of the deceased parents, should go to their respective children ; and that, after the decease of his surviving child, the capital of the residue should be divided amongst the children

of his said children, *per capita*. *A.* died first, *B.* next, and *C.* last. Both *A.* and *C.* left children, some of whom were living at *C.*'s death. *B.* had children, but they all died in her lifetime.

Held, nevertheless, that they took vested, transmissible interests in the dividends of *B.*'s share of the residue, which accrued between *B.*'s and *C.*'s deaths.

* *Ex relatione* Mr. Murray.

1851.

HOMER

v.

GOULD.

Habbin, my grandson,) of such one or two of my said children so dying: and, from and immediately after the decease of the survivor of my said children, I order and direct that my said trustees shall pay and divide all the residue of my estate so vested in them in trust as aforesaid, unto and amongst all my grandchildren, being the children of my said son and daughters, who shall be then living, (except the said *John Habbin*, my grandson,) equally to be divided among them, *per capita* and not *per stirpes*, share and share alike; and if any of my said grandchildren shall be then dead leaving lawful issue of their bodies, my will is that such issue shall stand in the place of such deceased parents respectively and receive the same proportion of my estate which such parent would have been entitled to if living.

Mrs. *Greenfield* was the survivor of the testator's three children, and died in 1842, leaving several children and grandchildren. *John Habbin*, the son, who died in 1818, also left children and grandchildren, many of whom were living at the death of his sister, Mrs. *Greenfield*. *Mary Randall*, the other child named in the will, had three children, all of whom died in her lifetime, namely, *John Randall*, *William Randall*, and *Susannah* the wife of *Benjamin Ragless*. *John Randall*, and *William Randall* both died infants and unmarried. Mr. and Mrs. *Ragless* had issue one child only, *John Ragless*, one of the Defendants to the suit.

During the period which elapsed between the death of Mrs. *Randall* and that of her sister, Mrs. *Greenfield*, the trustees of the will, had, from time to time, invested and accumulated the three-eleventh shares of the dividends bequeathed to Mrs. *Randall* during her life.

The bill was filed by some of the children and grandchildren of Mrs. *Greenfield*, for distribution of the residue; and the only question in the Cause was as to the devolution of the accumulated dividends.

1851.

HOMER
v.
GOULD.

On the part of the Plaintiffs it was contended that the dividends of the parents' shares of the residue were intended to go to their children, only by way of substitution for their parents, in case they survived their parents: and that, as Mrs. *Randall's* children had all of them died in her lifetime, the dividends of her share formed part of the capital of the residuary estate and ought to be distributed accordingly.

On the part of *John Ragless* as representing the deceased children of Mrs. *Randall*, it was contended that those children took vested, transmissible interests in the three-eleventh shares of the dividends, in the same way as they would have done if, instead of being a gift of dividends *pour autre vie*, it had been a simple gift of capital.

Mr. *Stuart* and Mr. *Murray* appeared for the Plaintiffs.

Mr. *Fleming* and Mr. *A. Hill* for parties in the same interest.

Mr. *Malins* and Mr. *W. M. Mackeson* for the Defendant, *John Ragless*.

Mr. *Kenyon Parker* and Mr. *Berkeley*, for the trustees.

1851.

HOMER

v.

GOULD.

The VICE-CHANCELLOR :

I have no hesitation in coming to the conclusion that the gift of the dividends was an absolute gift, and that the deceased children of Mrs. *Randall*, consequently, took vested interests. It is, of course, impossible to say what was the intention of the testator. Very probably it was the other way ; but I can only construe the will as I find it.

It is clear that if the interest of a sum of money were given to *C. D.* during the life of *J. S.*, and *C. D.* were to die living *J. S.*, the representatives of *C. D.* would be entitled : and I can see no distinction between such a case and the present one. The accumulations must, therefore, go to the persons now representing Mrs. *Randall's* children.*

* In the course of the hearing of the Cause, it was said that Sir *L. Shadwell*, on the Cause coming before him on the original hearing, had expressed an opinion that, as Mrs. *Randall's* children had died in her lifetime, they were not entitled to the dividends of her share.

STEVENS v. WILLIAMS.

MOTION, by Defendant, that the next friend of the Plaintiff, *a married woman*, might give security for the costs of the suit.

The next friend was a relation of the Plaintiff's, and she swore that he was the only person whom she could procure to be her next friend, in a suit instituted, as this was, against a rich banker in her neighbourhood. The next friend was not alleged to be in debt, and the only objection that was made to him, was that he was a labourer.

Mr. *Bethell* and Mr. *Glasse* moved, and cited *Pennington v. Alvin* (a) and *Drinan v. Mannix* (b).

Mr. *Rolt* and Mr. *Renshaw*, opposed, and cited *Dowden v. Hook* (c), *Fellows v. Barrett* (d), and *Jones v. Fawcett*. They said that a Defendant had no right to insist on the solvency of a next friend, except where the Plaintiff applied to change him; and that there were peculiar circumstances in *Pennington v. Alvin*, on which the decision in that case was founded.

The VICE-CHANCELLOR said that any person might institute a suit on behalf of an infant; but a suit in which a married woman was Plaintiff, was her own suit,

1851:
1st May.
Practice.
Married
Woman.
Next friend.
Security for
costs.

Security for costs ordered to be given in a suit in which a married woman was Plaintiff by her next friend, the next friend being a labourer.

(a) 1 Sim. & Stu. 264.

(b) 3 Dru. & Warr. 154.

(c) 8 Beav. 399.

(d) 1 Keen, 119.

1851.

STEVENS

v.

WILLIAMS.

and her next friend was selected by her : that the reason given by Lord *Langdale* for his decision in *Dowden v. Hook*, led him to a contrary conclusion ; and that he must act according to what was stated to be the practice of the Court in *Pennington v. Alvin* and *Drinan v. Mannix*, and should make the same order as was suggested in the former and made in the latter of those cases, namely, that all proceedings in the suit should be stayed until security for costs should be given in the usual manner.*

* The notice of motion asked that the *Master* might be directed to approve of the security ; but it was said that the security to be given was a bond for 100*l*.

BELL v. JACKSON.

THIS was a special case, stated for the opinion of the Court under Sir *Geo. Turner's Act*, 13 & 14 Vict. c. 35.

1851:
6th May.
Will.
Construction.

Thomas Biddles the elder made his will dated the 25th of October 1834, which, so far as it need be stated, was as follows:

"I give to my granddaughter, *Elizabeth Biddles Noon*, the sum of 4000*l.*, to be paid to her on her attaining the age of twenty-one years: and I direct my executors to place the same out at interest, and apply a competent part of such interest for her maintenance, education or advancement in life, until she shall attain that age: but, in case she shall die under that age, then the said principal sum and all unapplied interest, and her share of the residue of my estates, shall go and belong unto all my sons and my daughter, *Mary*, in equal shares, absolutely for ever. I give devise and bequeath all the residue and remainder of my real and personal estate whatsoever, equally between and amongst my sons, *James, Robert, John, William* and *Thomas*, my daughter *Mary*, and the said *Elizabeth Biddles Noon*, and to their several heirs, executors, administrators and assigns, absolutely."

Testator gave 4000*l.* to his granddaughter, and directed his executors to pay it to her on her attaining twenty-one, and to apply the interest of it for her maintenance, during her minority. By a codicil, he directed that his granddaughter should have only the interest of 2000*l.*, for her maintenance, until she attained twenty-three, and that the interest of the other 2000*l.* should be accumulated, and that, on her attaining twenty-three, his executors should

have the whole settled upon her, for her life, and, after her death, to her child or children, in equal proportions so that no husband of hers might spend it. The granddaughter attained twenty-three, and died without having had a child and without the executors having made any settlement of the legacy.

Held that the gift in the will, was an absolute gift, and that, in the events that had happened, it was not affected by the codicil.

1851.

BELL

v.

JACKSON.

The testator made a codicil dated the 21st of January 1837, which, so far as it need be stated, was as follows :

“ I will and direct that my granddaughter, *Elizabeth Biddles Noon*, shall only have the interest of 2000*l.*, for her maintenance, education and bringing up until she arrives at the age of twenty-three years; and the interest of the other 2000*l.* I direct my executors to put out to interest, so that it may become principal, and, at the time of the said *Elizabeth Biddles Noon* arriving at the age of twenty-three years, I hereby direct my said executors to have the whole settled upon her for her life, and, after death, to her child or children, in equal proportions, so that no husband of hers may spend it.”

The testator made a second codicil, dated the 22nd November 1839, which, so far as it need be stated, was as follows :

“ I hereby revoke that portion of my will which gives the rest and residue of my personal estate to be divided amongst my several sons and daughters and *Elizabeth Biddles Noon* (except in case of the death of the said *Elizabeth Biddles Noon*): and I do, hereby, give the whole of the residue of my personalty, to my son *Thomas Biddles*, he paying the whole of my funeral and testamentary expenses instead of a portion of its being borne by my three sons, *John*, *William* and *Thomas Biddles*.”

The testator died on the 5th of December 1839. His executors set apart and invested a sufficient part of his estate, to satisfy the legacy of 4000*l.*; but they did not make a settlement of it pursuant to the direction in the first codicil.

Elizabeth Biddles Noon attained 23, in 1845. In 1849, she married the Plaintiff; and, by the settlement then made, she assigned all her interest in the legacy of 4000*l.*, to the Plaintiff, subject to a proviso that nothing therein contained should prejudice her sole and separate life-interest in the legacy. In February 1851 she died without having had any issue, and without any settlement of the legacy having made pursuant to the direction in the first codicil. All the interest of the legacy was paid to her up to the time of her death.

1851.
BELL
v.
JACKSON.

The question was whether, in the events which had happened, the Plaintiff took any and what interest in the legacy of 4000*l.* bequeathed by the will and first codicil?

Mr. *Freeling*, for the Plaintiff, said that the gift of the legacy, in the will, was an absolute gift; and that, though it was cut down by the first codicil, it was cut down only for certain purposes; and that, where there was, first, an absolute gift, and then a revocation of it for specified purposes, if those purposes failed, the absolute gift took effect. *Lassence v. Tierney* (a) and *Mayer v. Townsend* (b).

Mr. *Woolley* appeared for the Defendant, the testator's surviving executor, and submitted the question to the Court.

The VICE-CHANCELLOR held that the interests in the legacy, which Mrs. *Bell's* children would have taken, if she had had any, were carved out of the absolute gift of

(a) 1 Macn. & Gord. 551 See judgment 561 and 562.

(b) 3 Beav. 443.

1851.

BELL

v.

JACKSON.

the legacy in the will ; and that, as she had never had a child, the absolute gift in the will remained unaffected : and he declared that she took an absolute interest in the legacy, subject to the interests of her children, if she had had any.*

* The Court has no power to make a decree or order on a special case. See 13 & 14 Vict. c. 35, sect. 14.

Normley v Williams
1851: "1851 394"

9th, 10th, 12th,
27th, 28th, and
29th May.

Agreement.

Pleading.

*Railway Com-
pany.*

BEMAN v. RUFFORD.

IN the spring of 1844, a scheme was formed, by certain individuals in concert with the Great Western Railway Company, for making a broad-gauge railway from *Wolverhampton* by *Worcester* to *Oxford* ; where it was to unite with the Great Western Railway ; and, in August following, the committee of management of the projected railway, agreed, with the directors of the Great Western,

A railway company constituted under an Act of

Parliament, agreed, with two other railway companies, that *the whole concern*, without incumbrance, when completed, should be *worked by those two Companies*, who should have *perfect control and exercise all the rights* of the first-mentioned Company, and who should find stock, and *work the concern for twenty-one years*.

Held that the agreement was illegal, as being in violation of the Act under which the first-mentioned Company was constituted ; and that, though a very large majority of the shareholders present at a meeting, had sanctioned the agreement, the dissentients might file a bill on behalf of themselves and the other shareholders against the Company and its directors, to have it declared void.

Railway Company.

A railway Act enacted that the railway should be constructed, in all respects to the satisfaction of the engineer of the Great Western (a broad-gauge railway) and that it should be formed of such gauge, and according to such mode of construction as to admit of its being worked continuously with the Great Western.

The Court was of opinion that the railway might be constructed on the narrow gauge as well as the broad.

to grant a lease of it to that Company, on certain terms (which, however, were varied by an agreement of the 20th of September 1844): and the Great Western agreed to use their exertions and influence to obtain an Act of Parliament for making the railway. Accordingly, in the next session of Parliament, a Bill was brought in for that purpose; and, after encountering great opposition from the Company then called the *London and Birmingham* Railway Company, it received the royal assent in August 1845. By it the projected Company was incorporated as: "The *Oxford, Worcester and Wolverhampton* Railway Company:" and, after reciting that the formation of the intended railway, would be beneficial to the interests of the Great Western, the Act empowered that Company to subscribe to and become shareholders in the undertaking, to the extent of 750,000*l.*; and to depute a person to vote on their behalf, at meetings of the Company; and to nominate six members of their body, to be directors of the Company. The Act then enacted that the railway should commence by a junction with the *Oxford* branch of the Great Western, and terminate at or near the *Wolverhampton* station of the Grand Junction Railway Company: that the railway should be constructed and completed, in all respects, to the satisfaction of the engineer of the Great Western, and should be formed of such gauge and according to such mode of construction as would admit of its being worked continuously with the Great Western: and, after reciting that the railway was intended to be connected with the *Birmingham and Gloucester* Railway at *Abbotswood*, and with the Grand Junction at or near *Wolverhampton*, the Act enacted that the Company thereby incorporated, should lay down and maintain, upon the whole extent of its line between the junction of it with the *Birmingham and Gloucester* at *Abbotswood* and the junction of it with the Grand

1851.

BEMAN

v.

RUFFORD.

1851.

BEMAN

v.

RUFFORD.

Junction near *Wolverhampton*, additional rails adapted to the gauge of those two railways, so as to allow of the free passage of carriages passing to or from them.* A subsequent section empowered the Company to lease their railway to the Great Western, for such term of years and on such conditions as might be mutually agreed on, and also to sell it to the Great Western; and it enacted that, after such sale, the two railways should be amalgamated. The Act then empowered the *Oxford, Worcester and Wolverhampton*, and the Great Western Companies, to enter into such contracts for effecting the purposes aforesaid, or for otherwise working or using the railway or any part thereof, or for the maintenance and repair thereof or any part thereof, as those two Companies might deem advisable, and subject to such terms and conditions as might be mutually agreed upon between them; and it enacted that any contract or agreement made, before the passing of the Act, for any of the purposes aforesaid, by the provisional committee of the *Oxford, Worcester and Wolverhampton* Railway, and the directors of the Great Western, should be as valid and binding as if made subsequently to the passing of the Act and in conformity with its provisions: and, after reciting that the Great Western were willing to undertake, in case of need, the due completion of the railway, it empowered the Great Western to complete it, in case the *Oxford, Worcester and Wolverhampton* Company should not do so within the time limited by the Act: and, after reciting that the Great Western Company were or might become, not only lessees or purchasers of the intended railway or subscribers to it, but would also derive considerable advantage from the construction of it, by means of the additional traffic which would be brought upon their main line, and, therefore,

* Sect. 44. It is referred to in the judgment.

it was reasonable to subject the Great Western to the provisions of an Act of the then last session, entitled, "An Act to attach certain Conditions to the Construction of future Railways," &c. (7 & 8 Vict. c. 85), the Act enacted that the provisions of that Act should apply to and include the Great Western in the same manner and to the same extent as if that Company had not been incorporated until the passing of the now-stating Act.

1851.
 BEMAN
 v.
 RUFFORD.

The Great Western, in exercise of the powers given to them by the Act, took shares in the railway to a large amount, and appointed members of their own body to be directors of it. On the 22nd of Novem. 1845, the *Oxford, Worcester and Wolverhampton* Company, finding that a greater capital would be required for making their railway than they at first supposed, one of their directors wrote to the chairman of the Great Western, requesting that Company to take into consideration the propriety of granting them a higher rent and other more favourable terms for the lease of their railway, than they had stipulated for by the agreement of September 1844. On the 25th of November, the chairman wrote, in answer, that he would bring the letter before the directors of the Great Western; and that he fully admitted the reasonableness of the grounds on which an alteration in the terms of the agreement was applied for. On the 10th of February 1846, the directors of the Great Western came to certain resolutions for granting an increased rent and other more favourable terms to the *Oxford, Worcester and Wolverhampton* Company: and, the shareholders of the Great Western, at a general meeting held on the 12th of the same month, empowered their directors to enter into an arrangement with the directors of the *Oxford, Worcester and Wolverhampton* Company, for modifying, in favour of the latter, certain of the terms of the agree-

1851.

BEMAN

v.

RUFFORD.

ment, subject to such conditions as might seem equitable between the Companies. Those resolutions were made known to the *Oxford, Worcester and Wolverhampton* Company; and on the 27th of the same month, the shareholders, at a meeting, empowered their directors to enter into an agreement, with the directors of the Great Western, for modifying the terms previously arranged for the lease of their line to that Company, subject to such conditions as might seem equitable between the Companies.

The bill, which was filed in March 1851, by three of the shareholders in the *Oxford, Worcester and Wolverhampton* Company, on behalf of themselves and the other shareholders except the Defendants, against that Company and the directors of it, and also against the *London and North-Western* and the *Midland Counties* Companies, after stating as above, alleged that it was for the interest of the shareholders in the *Oxford, Worcester and Wolverhampton* Company, that the line of that Company's railway, should be worked in concert with the Great Western; and that it was the duty of the directors of the former Company, to have carried into effect the agreement of September 1844 modified only by the said resolutions of the Great Western Company; and that the *Oxford, Worcester and Wolverhampton* Company, proceeded with their works and the same were laid out with the view of working their line in concert with the Great Western, on the broad gauge, according to their Act of Parliament and in pursuance of their agreement with the Great Western; but that, difficulties having arisen in raising the capital necessary for the said works, the further progress thereof, was partially suspended.

The bill then stated that a majority of the directors of

the *Oxford, Worcester and Wolverhampton Company*, had lately determined not to carry into effect the agreement so modified as aforesaid, or to enter into any agreement whatever with the Great Western, or to work their line in connection with that Company; and that they had entered into the following arrangement with the *London and North-Western* and the *Midland Counties Companies* :—

1851.
BEMAN
v.
RUFFORD.

“ The *Oxford, Worcester and Wolverhampton Railway* to be completed, as a narrow-gauge double line, (except as follows) ready for efficient working in all respects, from the *Bucks* line at *Oxford*: *The whole concern without incumbrance, when completed, to be worked by the London and North Western and Midland Companies, who shall have perfect control, and exercise all the rights of the Oxford, Worcester and Wolverhampton Company, and who shall find stock and work the concern for twenty-one years* on the following terms : The gross receipts from all sources, to be carried to a common fund out of which the following charges are to be paid in the order stated :—

First. 53,000*l.* per annum to the *Oxford, Worcester and Wolverhampton Company*, to provide for debentures and preference shares, or such less or greater sum, not exceeding 60,000*l.*, as may, from year to year, be sufficient, within such limit, to provide for such charges.

Secondly. 53,000*l.* to be taken, by the *London and North Western and Midland Companies*, for working expences wear and tear &c.

Thirdly. The balance of gross receipts (the excess, if any, above 106,000*l.*) to be divided in the proportions of two-thirds to the *Oxford, Worcester and Wolverhampton*

1851.

BEMAN

v.

RUFFORD.

Company, and one-third to the *London* and North Western and Midland Companies, until the gross receipts reach 150,000*l. per annum*, from which point all excess receipts above 150,000*l.*, shall be equally divided between the *Oxford, Worcester* and *Wolverhampton* Company and the *London* and the North Western and Midland Companies.

There is divided

	to <i>O. W. & W.</i>		to <i>L. & N. W.</i> & Mid. Cos.
Under this when } earnings are	£106,000	£53,000	£53,000
„	£151,000	83,000	68,000
„	£201,000	108,000	93,000.

Should more than 53,000*l.* be required to pay interest and debentures, the excess, within the limit of 60,000*l.*, also to be paid to the *Oxford, Worcester* and *Wolverhampton* Company : Equal mileage rates to be allowed to the *Oxford, Worcester* and *Wolverhampton* account, for all traffic passing over the lines of the *Oxford, Worcester* and *Wolverhampton*, and *London* and North Western or Midland Companies. The route by which the traffic where the lines of the three parties to this agreement go to and from the same places, to be settled by Messrs. *Peto* and *Glyn*, or Mr. *Beale*, with an umpire in case of need ; it being expressly understood that, while the *Oxford, Worcester* and *Wolverhampton* is credited with its fair and full amount of traffic, the interests of the *London* and North Western and Midland Companies, who take the responsibility of this agreement, shall also be equally considered in the matter ; it being understood that every thing is to be done with a view of treating the lines of the *Oxford, Worcester, Wolverhampton* and the *London* and North Western and Midland Companies, as one

interest as respects the competition of other Companies.

1851.
BEMAN
v.
RUFFORD.

A single line only, with proper sidings and passing places, and the telegraph, to be laid down, in the first instance, between *Oxford* and *Moreton-in-the-Marsh* (or *Daylesford*); but the line to be doubled, at the cost of the *Oxford, Worcester and Wolverhampton* Company, provided, during the existence of this agreement, the traffic requires it:

A junction to be made, by the *Oxford, Worcester and Wolverhampton* Company, with the *Stour Vale* line at *Tipton*.

All liabilities to be provided for (under the meaning of clause 2) by the *Oxford, Worcester and Wolverhampton* Company.

The canals and *Moreton* tramway to be treated as part of the railway, and as included in the arrangement.

Any question as to the sufficiency or extension of accommodation of line, works, stations &c., as well as all other questions arising under the agreement and during the continuance of the same, to be settled by the arbitration of Mr. *T. Smith* and Mr. *Peto*, with an umpire chosen by them if needed.

MEMORANDUM.

It is understood that, if any portion of the line be ready for working, with proper stations &c., before the remainder, Mr. *Glyn* shall fix the terms, as between the Company on whose line the same abuts and the *Oxford, Worcester, and Wolverhampton* Company and under this

1851.

BEMAN

v.

RUFFORD.

agreement, on which the same is to be worked until the whole be completed.

The bill then set forth certain resolutions which were come to, with reference to the said arrangement, at a meeting of the directors of the *Oxford, Worcester and Wolverhampton* Company, on the 21st of February 1851. One of them was that the seal of the Company should be affixed to the memorandum of agreement then read, made by Mr. *Peto* with Mr. *Glyn* and Mr. *Ellis*, in token of the approbation of that Company, of such memorandum : and that the document, when sealed, should be delivered, as an escrow, to the solicitors, with instructions to exchange the same for a similar document executed by the *London* and North Western Company ; and that, at the time of making such exchange, certain other resolutions (which also the bill set forth) should be attached, with the seal of the *Oxford, Worcester and Wolverhampton* Company appended. One of those other resolutions was that the *Oxford, Worcester and Wolverhampton* Company retained power to insure full development of the traffic of the line, in a manner satisfactory to the board of directors.

The bill next stated that Mr. *Glyn* and Mr. *Peto* were the chairmen of the *London* and North Western and *Chester* and *Holyhead* Companies, the line of which last-mentioned Company was worked under an agreement with the North Western Company ; and that Mr. *Beale* was a director of the Midland Counties Company : and that, at a meeting of the shareholders of the *Oxford, Worcester and Wolverhampton* Company held on the 28th of February 1851, the before-mentioned arrangement was reported to the meeting and adopted by the majority of votes, and that it had been sealed with the seals of

the three Companies, parties to it, and that they were about to take steps to carry it into effect: That the agreement was contrary to the interests of the *Oxford, Worcester and Wolverhampton* Company, and to the constitution of that Company, and to the spirit and express enactments of their Act, and was not authorized by any Act relating to the three Companies or any of them, and was beyond and inconsistent with their powers: that the *Oxford, Worcester and Wolverhampton* Company's Act did not authorize the laying down of rails on the whole of their line, on the narrow gauge, or indeed on any part of it south of *Abbotswood*; but the directors of that Company were expending its monies and funds in constructing the *Oxford, Worcester and Wolverhampton* Railway, throughout its whole length, on the narrow gauge; and that they were not constructing, nor did they intend to construct that Company's works according to the provisions of its Act of Parliament; and they had wholly abandoned all intention to construct them pursuant to those provisions; and that, by the last-mentioned agreement, the powers given to the *Oxford, Worcester and Wolverhampton* Company, were attempted to be delegated to the *London and North Western* and the *Midland Counties* Companies. The bill charged that it was not and never could be the interest, nor was it the intention of the *London and North Western* and the *Midland Counties* Companies, to fairly and efficiently work the *Oxford, Worcester and Wolverhampton* Railway, or to fairly develop the traffic thereof; inasmuch as that Railway was and must be a competing line to the lines of the other two Companies; and it was their interest and would be their aim and object to divert, from the *Oxford, Worcester and Wolverhampton* Railway to their own lines, all traffic beyond such an amount as would produce the annual sum of 106,000*l*.

1851.
BEMAN
v.
RUFFORD.

1851.

BEMAN

v.

RUFFORD.

The bill prayed that the agreement with the *London* and North Western and the Midland Counties Companies might be declared to be at variance with the provisions of the *Oxford, Worcester and Wolverhampton* Company's Act, and to be void; and that the directors of that Company, and, if necessary, that Company itself, and that the *London* and North Western and the Midland Counties Companies, might be restrained from carrying the agreement into effect, and from constructing the railway pursuant thereto, or otherwise than according to the provisions of the Act for making it, and from expending any of the funds of the Company in constructing the railway in conformity to the agreement.

The contents of the bill were verified by an affidavit made by the Plaintiffs. An affidavit made by three of the directors of the *Oxford, Worcester and Wolverhampton* Company, stated that they had been advised and believed that the agreement of September 1844, was not valid or binding on the *Oxford, Worcester and Wolverhampton* or on the Great Western Company, nor was such agreement, as modified by the resolution of the Great Western Company of the 10th of Feb. 1846, valid or binding on those Companies or either of them; and that there was no valid or binding agreement between them: that the *Oxford, Worcester and Wolverhampton* Company being unable to conclude any satisfactory, definite and legal agreement with the Great Western, and being in considerable pecuniary difficulty, mainly occasioned by the refusal of the Great Western to conclude any valid agreement with them, the directors of that Company, in January 1851, determined to apply, to some other Company, to enter into traffic arrangements on fair terms, with a view to the benefit of the proprietors of the *Oxford, Worcester and Wolverhampton*

Company: That it was under the belief that such arrangement was then necessary and expedient for the completion of the *Oxford, Worcester and Wolverhampton* Railway and the welfare of the Company, that the directors of that Company concluded the agreement with the *London and North Western and Midland Companies*: That that agreement was adopted by an overwhelming majority, and almost unanimously, by the shareholders in the *Oxford, Worcester and Wolverhampton* Company, at the meeting of the 28th February 1851: That the deponents were informed and believed that it was lawful and consistent with the provisions of the *Oxford, Worcester and Wolverhampton* Railway Act, that the broad gauge should be laid down only on one line of rails; and *that it was intended, by the directors of that Company, that a single line of rails on the broad gauge, should be laid down throughout the whole length of the railway; and that there was not any provision in the Act, which prohibited or prevented the laying rails on the narrow gauge, on the whole of the said railway*: That, believing it to be within the powers of the *Oxford, Worcester and Wolverhampton* Company to lay down rails on the narrow, as well as the broad gauge, and that the exercise of such power was within the financial means of the Company, and that the agreement with the *London and North Western and the Midland Company*, would be, thereby, rendered more beneficial to the *Oxford, Worcester and Wolverhampton* Company, the directors of that Company proposed to lay rails, on the whole of the line, as well on the narrow as on the broad gauge, and proposed to form the whole of the railway with reference thereto. The deponents denied that the directors of the *Oxford, Worcester and Wolverhampton* Railway Company, were expending, or that, unless with

1851.
BEMAN
v.
RUFFORD.

1851.

BEMAN

v.

RUFFORD.

the sanction of Parliament, they intended thereafter to expend the monies and funds of the Company in constructing the railway with rails, throughout the whole length, on the narrow gauge only : That all the contracts that had been entered into for the works of the railway, were entered into before the making of the said agreement, and with a view of laying down rails on the broad gauge, throughout the whole length of the railway, and that no change in the terms of such contracts, had been made, or was intended to be made, except in so far as to enable the *Oxford, Worcester and Wolverhampton* Company to order the laying of the narrow, as well as of the broad gauge : That the deponents believed that the directors of the *Oxford, Worcester and Wolverhampton* Railway Company, had authority, under their Act of Parliament, to carry on and complete the railway, throughout the whole length, so as to be adapted to work continuously with the Great Western Railway, and also to have rails on the narrow gauge in addition thereto, and that the funds of the Company were more than sufficient to accomplish both of those objects : That the directors of the *Oxford, Worcester and Wolverhampton* Company, were then constructing, and they intended to construct their railway, in conformity with the provisions of their Act, and also in conformity with the agreement with the *London* and North Western and the Midland Company ; which the Deponents were advised and believed, was not in violation of the Act : That, by the agreement, the powers of the Act were not attempted to be delegated to the *London* and North Western and the Midland Company : that the deponents denied that the directors of the *Oxford, Worcester and Wolverhampton* Company had determined or intended, as part of the arrangement with the two other Companies, to hand over to them, or

to permit them to receive any monies or revenues of the Company; and that they had been informed and believed that the agreement was legal.

1851.
BEMAN
v.
RUFFORD.

On the hearing of a motion for the injunction prayed for by the bill,

Mr. *Roundell Palmer* and Mr. *G. L. Russell* appeared for the Plaintiffs.

Mr. *Bethell* and Mr. *Freeling* for the Great Western Company, and

The *Solicitor-General*, Mr. *Rolt*, Mr. *Malins*, Mr. *Willcock*, Mr. *Follett*, Mr. *Berkeley* and Mr. *Jessel*, for the other parties.

In the course of the argument, which is stated in the judgment, the following cases were cited: *Bagshawe v. The Eastern Union Railway Company* (a), *Ward v. The Society of Attorneys* (b), *Colman v. The Eastern Counties Railway Company* (c), *Carlisle v. The South Eastern Railway Company* (d), *Foss v. Harbottle* (e), *Mozley v. Alston* (f), and *Lord v. The Copper Miners Company* (g).

The VICE-CHANCELLOR :

The bill is filed by three of the shareholders in the *Oxford, Worcester and Wolverhampton Railway Company*, on behalf of themselves and of all the others; and

- | | |
|--------------------------|-------------------|
| (a) 6 Railw. Cas. 152. | (e) 2 Hare, 461. |
| (b) 1 Coll. 370. | (f) 1 Phill. 790. |
| (c) 4 Railw. C. 513. | (g) 2 Phill. 740. |
| (d) 1 Macn. & Gord. 689. | |

1851.

BEMAN

v.

RUFFORD.

the object of it is to prevent the funds of the Company from being applied in a mode in which, by Act of Parliament, they are not authorized to be applied; and the parties who have filed this bill, were clearly entitled to file it for that purpose. No doubt the parties who are materially interested in the question, are the Great Western Railway Company: there is no disguising that, nor, as far as I can see, is there any wish to disguise it. The bill, however, is filed by the shareholders in the *Oxford, Worcester and Wolverhampton* Railway Company, and the principle on which they are entitled to file it on behalf of themselves and all the other shareholders, is that this Court will not allow any of them to say that they are not interested in preventing the law of their Company from being violated. It will not allow any of them to speculate as to whether it would be more advantageous to do something which the Act of Parliament does not authorize to be done; and therefore it is that a very small number or, indeed, one of the shareholders may file a bill on behalf of the whole body, although, at a meeting of the Company, a large majority of the other shareholders may have sanctioned that course of proceeding which the bill complains of. The shareholders so filing this bill, say that their Company, together with the directors of it, have entered into a contract, with the North Western and the Midland Companies, to make a railway different from that which was contemplated by the Act of Parliament, and so to apply funds, which the Plaintiffs say are their funds, in a mode in which they were never authorized to be applied; and, therefore, the Plaintiffs seek to restrain them.

The case was rested on three main grounds. First of all, it was said that, by the Act of Parliament which incorporated the *Oxford, Worcester and Wolverhampton* Company,

there was a sort of union constituted between them and the Great Western Railway Company, which rendered it impossible for the *Oxford, Worcester and Wolverhampton* Company, afterwards, to unite themselves, in interest, with the North Western Company or the Midland Company, to the prejudice of the Great Western Company. Secondly, it was said that, if that be not a correct view of the case, still there were contracts between the *Oxford, Worcester and Wolverhampton* Company and the Great Western Company, which prevented them, independently of the Act of Parliament, or, if not independently, together with the Act of Parliament, from contracting with the *London and North Western* and the *Midland Counties Companies*: and, thirdly, it was said that the contract which has been entered into between the *Oxford, Worcester and Wolverhampton* Company and the *North Western and Midland Companies*, is a contract which, irrespective of any engagement of the *Oxford, Worcester and Wolverhampton* Company with the Great Western Company, is, of itself, an illegal contract, and, therefore, ought not to be carried into effect: and, if that be a correct view of the law, I am clearly of opinion, both on principle and authority, that it is the province of this Court to prevent the contract from being carried into effect: because, on the principle that has been so often laid down, this Court will not tolerate that parties having the enormous powers which railway companies obtain, should apply one farthing of their funds in a way which differs, in the slightest degree, from that in which the Legislature has provided that they shall be applied.

I have already said it is my opinion, and it is my strong opinion, that the contract which has been entered into between the *Oxford, Worcester and Wolverhampton*

1851.
BEMAN
v.
RUFFORD.

1851.

BEMAN

v.

RUFFORD.

Company and the North Western and the Midland Companies, is a contract which is illegal; at the same time, it is, undoubtedly, purely a legal question; and, therefore, I must direct a case to be stated for the opinion of a Court of Law upon the point.

Then the question arises what is to be done after the case is stated, and before the opinion of the Court of Law is given upon it? That I take to be purely a question for the discretion of this Court. The present *Lord Chancellor*, Lord *Truro*, states that very distinctly, in the case to which I was referred: *The Shrewsbury and Birmingham v. The London and North Western Railway Company* (*h*). That case came before Lord *Truro* on a motion to dissolve an injunction which was granted after Lord *Cottenham* had decided that the contract which had been entered into between the parties, was a legal contract, or, at all events, that the bill which sought a specific performance of that contract, was not demurrable: and Lord *Truro*, evidently, I think, doubting whether Lord *Cottenham* had not been hasty in his view, gave the Plaintiffs liberty to bring such action as they might be advised, but refused, and, I think most wisely, to continue the injunction until the trial of the action. His Lordship, however, directed the Defendants to keep an account, which, he said, would, probably, be more beneficial to the Plaintiffs than continuing the injunction would be; for, if it should turn out, eventually, that the Defendants had no right to do what the bill sought to prevent, then he should only have to direct them to account, to the Plaintiffs, for the profits which they had made, and complete justice would be done to the Plaintiffs; and, if it should turn out otherwise, no injury

would be done to any one. But that is not the case here; because the Plaintiffs say that their money is intended to be laid out in constructing a railway which their Company have no right to construct; and that, thereby, irreparable injury will be done to them; for their money cannot be got back by taking up the rails and selling them; and the Company, if not insolvent, is in great pecuniary difficulties. Under these circumstances, if I am right in saying that the agreement is illegal, or that it has such an appearance of illegality that I must direct a case for the opinion of a Court of Law, I must couple that with an interim injunction restraining the expenditure of the money in the prohibited mode; and that is the course which I propose to take.

That being so, I will now state why it is that I think this agreement is illegal. It first stipulates that the *Oxford, Worcester and Wolverhampton* Railway, except a certain part of it, on which a single line of narrow-gauge rails is to be laid down, shall be constructed as a double narrow-gauge line. Consequently, according to this agreement, rails are to be laid down, throughout the whole of the line, on the narrow gauge. Then the first question that arises, is whether, regard being had to their Act of Parliament, the *Oxford, Worcester, and Wolverhampton* Company have a right to make a narrow-gauge line throughout? In my opinion, although I intend to grant the interim injunction, they have: for I think that all that they are bound to do in conformity with their Act of Parliament, is to form their railway of such a gauge as will admit of its being worked continuously with the Great Western, and to lay down, on certain parts of their line, additional rails adapted to the gauge of the *Birmingham and Gloucester* and *Grand Junction* Railways, that is to say, to make a broad gauge through-

1851.

BEMAN

v.

RUFFORD.

1851.

BEMAN

v.

RUFFORD.

out the whole line, and a mixed gauge or a narrow gauge on part of it.

It may be asked, if it is my opinion that they have a right to lay down rails on the narrow-gauge, why do I restrain them from doing so? My answer is that, although I think that, if the Company meet and resolve, as an abstract proposition, that it will be for their interest to lay down a narrow-gauge line of rails, they may do so; yet I think that they cannot do it in pursuance of the agreement which they have made with the North Western and Midland Companies; because, in my opinion, that agreement is quite illegal; and I do not know what arrangement the *Oxford, Worcester and Wolverhampton* Company would have made, if it had not been for that agreement. That is the reason why I do not think that the question, whether they may lay down a continued narrow-gauge line of rails, really arises in this case: for, whether they can make such a line or not (though it is my opinion that they can) I am clear that they cannot make it pursuant to this agreement.

My reason for thinking so is that, having agreed to make a narrow-gauge line throughout, except in a particular place, (where it is to be only single for a certain time) they go on to say this: "The whole concern, without incumbrance, when completed, to be worked by the *London* and North Western and Midland Companies, who shall have perfect control and exercise all the rights of the *Oxford, Worcester and Wolverhampton* Company, and who shall find stock and work the concern for twenty-one years, on the following terms: The gross receipts, from all sources, to be carried to a common fund; out of which the following charges are to be paid in the order stated: First, 53,000*l.* per annum (or it

may be, eventually, 60,000*l.*) to the *Oxford, Worcester and Wolverhampton* Company, to provide for debentures and preference shares." In my opinion, this is neither more nor less than a contract, on the part of the *Oxford, Worcester and Wolverhampton* Company, that, when their line is completed, they will hand it over to be worked by the *London and North Western* Company and the *Midland* Company. I put the question, several times, to the various gentlemen who appeared in the different interests, and I do not think that any of them construed it quite in the same way; but, in my opinion it is just the same thing, practically, as if they had leased the line to the two other Companies: because what they say is, not that the *Midland* and the *North Western* Companies are to run their trains upon the line, but that the whole concern, without incumbrance, when completed, is to be worked by the *London and North Western* and *Midland* Companies, who shall have perfect control and exercise all the rights of the *Oxford, Worcester and Wolverhampton* Company. However, as a case will be stated for the opinion of a Court of Law upon this agreement, I shall not make any further observation upon it than that, in my opinion, by it the *Oxford, Worcester and Wolverhampton* Company are delegating the functions which the Legislature has given them, to other parties, which they have no possible right to do. For the security of the public, there are a vast quantity of duties imposed on that Company. They are bound to have station-masters and policemen and to have proper people to attend to the signals; and a variety of other duties are imposed upon them, in which the public are concerned. And, although it was said that there was nothing in the agreement to prevent the construction that the *Oxford, Worcester and Wolverhampton* Company are still to do all these things, and that the meaning of the contract is

1851.
BEMAN
v.
RUFFORD.

1851.
BEMAN
v.
RUFFORD.

that the North Western and the Midland Companies are, merely, to run their carriages on the railway; I must say I think it is idle to suppose that that was the meaning. The Act requires a great many things to be done by this incorporated Company, which the Company has agreed shall be done, not by themselves, but by the North Western and the Midland Companies; therefore, in my opinion, the agreement is illegal. And I do not think that view of it is at all varied by the circumstance that, when the *Oxford, Worcester and Wolverhampton* Company were about to put their seal to it, they appended the following resolution: "That this Company retain power to ensure the full development of the traffic of the line in a manner satisfactory to the board." After they have delegated, to others, the full right of working the railway, with all the powers they had themselves, it would be difficult, according to any definition of the term, 'development,' to say that they could exercise and fulfil their powers, and perform all their engagements. I think that what they meant by that resolution, was that if they found that the North Western and Midland Companies were playing them false, and not sending a due proportion of the traffic that was coming from beyond *Wolverhampton* up to *London*, through the *Oxford, Worcester and Wolverhampton* line, but taking more than a fair share over the old *Birmingham* line, that then they might call them to account for so doing. That I think is the meaning of the resolution: it clearly cannot annul (for that was the argument) all that went before: if that were so, it would neutralize the whole, and make the agreement a nullity; and, therefore, it is impossible to put that construction upon it. For these reasons, which I have stated shortly, I think that the agreement is void, and that I ought to restrain the parties from carrying into execution that part of it at least, which, if I do not restrain them, may cause

what we call, for want of a better expression, irreparable injury, that is, the expenditure of money which it will be impossible, perhaps, ever to get back again.

1851.
BEMAN
v
RUFFORD.

That is the view I take of the case, and, having said *that*, it is not strictly necessary for me to say any more. My view is that it would have been competent to the Company to have sanctioned a double or a single narrow-gauge line throughout, but that it is not competent for them to enter into this agreement ; and so that I cannot permit that narrow-gauge line to be made in pursuance of this agreement, which is, in itself, altogether void.

With regard to the other part of the argument, namely, that the *Oxford, Worcester and Wolverhampton* Company is bound to the Great Western Company, I confess I have not felt at all satisfied about that ; and as I am of opinion, on the other ground, that I ought to restrain the Defendants, it is not necessary for me to decide that matter ; but I think that the answer that has been given is satisfactory. No doubt great powers have been given to the Great Western Company, with reference to the other Company ; but they are all defined. They are to have the right of taking a very large quantity, (about 750,000*l.* worth) of shares. They are to have, whether they take the shares or not (as I read the Act) six of their own body as directors of this body. They are empowered to take a lease of the railway ; and it is to be constructed, in all respects, to the satisfaction of their engineer : and the gauge of it is to be such as to admit of its being worked continuously by them ; and one or two other powers are given to them ; but they are all defined : and I do not think that there is anything in the Act which prevents the *Oxford, Worcester and Wolverhampton* Company from doing anything that may be thought, by

1851.

BEMAN

v.

RUFFORD.

the Great Western Company, prejudicial to them, if it is not, necessarily, in contravention of the particular clauses relating to them. With regard to the agreements between those two Companies, I do not think there is now any binding one. Perhaps, at one time, there was. I allude to the agreement of the 20th of September 1844 which was entered into before the Act passed; but after the Company was formed, and when it was found that a vast deal more money than was originally supposed, was required to make the railway, that agreement was abandoned by common consent, as being an impossible agreement. Then they applied to the Great Western to guarantee to them a much larger amount of rent than they had originally stipulated for; and to grant them more beneficial terms for the lease of their railway in other respects. And the Great Western took the application into consideration, and passed certain resolutions which showed their willingness to comply with it to some extent at least; but the *Oxford, Worcester and Wolverhampton* Company do not appear to have done anything in consequence of those resolutions, beyond empowering their directors to enter into an agreement with the Great Western, subject to such conditions as might seem equitable. Under these circumstances, it does not seem to me that there is any binding agreement between the Great Western and the *Oxford, Worcester and Wolverhampton* Companies.

The order which I shall make is that a case be stated for the opinion of a Court of Law as to the validity of the agreement between the *Oxford, Worcester and Wolverhampton* Company and the *London and North Western and Midland Counties* Companies; and that, in the mean time, the *Oxford, Worcester and Wolverhampton* Company be restrained from doing any Act for

or towards carrying into effect so much of that agreement as relates to the laying down of rails on the narrow gauge, on any part of the *Oxford, Worcester and Wolverhampton* Company's line, except that part of it which is specified in the 44th section of their Act.

1851.
BEMAN
v.
RUFFORD.

NAVULSHAW v. BROWNRIGG.

IN March 1847, the Plaintiff, a merchant in *India*, shipped two boxes of pearls and consigned them to the Defendants, *Brownrigg and Co.* of *Liverpool*, for sale on his account. Shortly before the pearls arrived in *England*, Messrs. *Brownrigg* informed the Defendants *Collet and Co.* their *London* correspondents, that they expected to receive a parcel of pearls, from *India*, for sale; and *Collet and Co.* at their request, made some inquiries as to the state of the market for pearls and communicated the result to them. The pearls arrived in May 1847, and on the 26th of that month, *Brownrigg and Co.*, sent them to *Collet and Co.*, to get them valued. The amount of the valuation was 2050*l.* After the valuation had been made, *Brownrigg and Co.* instructed *Col-*

1851 :
11th and 16th
June.

Factor.
Principal and
agent. c

The Plaintiff, a merchant in *India*, consigned goods to *A.* of *Liverpool*, to sell on his account, and drew bills against the goods, which *A.* accepted. *A.* then placed the goods in the hands of *B.* his correspondent

in *London*, with instructions to sell them or cause them to be sold, and drew a bill upon *B.* for 1680*l.*, which *B.* accepted on the security of the goods, but with notice that the Plaintiff had consigned the goods to *A.* for sale on his account. *A.* became insolvent, leaving the bills drawn by the Plaintiff, unpaid. *B.* paid the bill for 1680*l.*, and then sold the goods for 1300*l.* A bill filed by the Plaintiff, against *A.* and *B.* for an account and payment, by *B.*, of the proceeds of the goods; was dismissed with costs.

A bill for an account by a principal against his agent, is not sustainable where the transaction to which it relates, is a single transaction, not tainted with fraud, and the Plaintiff has a remedy at law.

1851.
 NAVULSHAW
 v.
 BROWNRIFF.

let and Co. to cause the pearls to be sold, and requested those gentlemen to accept a bill for 2000*l.* on the security of them ; which *Collet and Co.* did. Before that transaction took place, *Brownrigg and Co.* had accepted bills drawn by the Plaintiff against the pearls, to the amount of 2466*l.* : but *Collet and Co.* did not know that they had done so until several months afterwards ; nor were those gentlemen informed, when they accepted the bill for 2000*l.*, that the pearls were the pearls which *Brownrigg and Co.* alluded to when they said they expected to receive a parcel of pearls from *India*, for sale. But, shortly before July 1847, *Brownrigg and Co.* sent *Collet and Co.* the invoice which the Plaintiff had sent with the pearls. It was signed by the Plaintiff, and was headed as follows : "Invoice of a parcel containing two boxes of pearls, shipped per steamer '*Auckland*,' Capt. *Hamilton*, and consigned to Messrs. *Brownrigg and Co.* of *Liverpool*, for sale and returns on my account and risk." In July 1847 *Collet and Co.* caused the pearls to be put up for sale by auction ; but, with the exception of a small part, they were bought in. Those that were sold, produced 320*l.* On the 28th of August 1847, the bill for 2000*l.* fell due : and, it not being convenient to *Brownrigg and Co.* to supply the money required to pay it, *Collet and Co.*, at their request, accepted their bill for 1680*l.*, and *Brownrigg and Co.* got it discounted, and remitted the amount to *Collet and Co.*, in order that therewith and with the 320*l.*, they might take up the bill for 2000*l.* A similar transaction took place between the parties, on the bill for 1680*l.* becoming due. On the 27th of November 1847 *Brownrigg and Co.* stopped payment. *Collet and Co.*'s last acceptance fell due in January 1848, and they paid the holder the amount of it. All the bills drawn by the Plaintiff against the pearls, except one of small amount, were dishonoured. On the 4th of March 1848, Messrs. *Forbes and Co.*, to

whom the Plaintiff had sent a power of attorney to receive the pearls, applied to *Brownrigg and Co.* for them. *Brownrigg and Co.* replied, (but not until the 7th) that the pearls were in the hands of *Collet and Co.*, who had claims against them, *Brownrigg and Co.* On the 8th, *Forbes and Co.* inquired the date and amount of the advance: and, on the 9th, *Brownrigg and Co.* replied that the post which brought *Forbes and Co.*'s letter of the 8th, advised the sale of the residue of the pearls by *Collet and Co.*, and that the net proceeds would not exceed 1500*l.*, which *Collet and Co.* would naturally hold to reduce the balance due to them from *Brownrigg and Co.*, in account. The pearls were sold, by private contract, on the 8th of March, by a person employed by *Collet and Co.*, and produced 1300*l.*: and, on the 11th, those gentlemen wrote, in reply to a letter to them of the 10th, from the Plaintiff's solicitors that, having accepted and paid bills on account of the pearls, the proceeds were credited accordingly. Under these circumstances the bill was filed, charging the Defendants with fraud, and praying for an account and payment of the proceeds of the pearls.

1851.
 NAVULSHAW
 v.
 BROWNRIGG.

At the hearing of the Cause, the 4 Geo. IV. c. 83, s. 3, and the 6 Geo. IV. c. 94 were referred to; but the Act upon which the question in the Cause depended, was 5 & 6 Vict. c. 39; the 1st section of which is as follows: "Whereas, by an Act passed in the 6th year of the reign of his late Majesty King George the Fourth, intituled 'An Act to alter and amend an Act for the better Protection of the Property of Merchants and others who may hereafter enter into Contracts or Agreements in relation to Goods, Wares and Merchandize intrusted to Factors or Agents,' validity is given, under certain circumstances, to contracts or agreements made with persons intrusted with and in possession of the documents of title

1851.

NAVULSHAW

v.

BROWNRIGG.

to goods and merchandize; and consignees making advances to persons who are intrusted with any goods and merchandize, are entitled, under certain circumstances, to a lien thereon; but, under the said Act and the present state of the law, advances cannot safely be made, upon goods or documents, to persons known to have possession thereof as agents only: And whereas, by the said Act, it is amongst other things further enacted that it shall be lawful to and for any person to contract with any agent intrusted with any goods or to whom the same may be consigned, for the purchase of any such goods and to receive the same of, and to pay for the same to such agent, and such contract and payment shall be binding upon and good against the owner of such goods, notwithstanding such person shall have notice that the person making such contract or on whose behalf such contract is made, is an agent: *provided such contract or payment be made in the usual and ordinary course of business*, and that such person shall not, when such contract is entered into or payment made, have notice that such agent is not authorized to sell the same or to receive the said purchase-money: And whereas, *advances on the security of goods and merchandize have become an usual and ordinary course of business*, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to *bonâ fide* advances upon goods and merchandize as, by the said recited Act, is given to sales; and that owners intrusting agents with the possession of goods and merchandize or of documents of title thereto, should, in all cases where such owners, by the said recited Act or otherwise, would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances *bonâ fide* made on the security thereof: And whereas much litigation has arisen on the construction of the said recited Act, and

the same does not extend to protect exchanges of securities *bonâ fide* made, and so much uncertainty exists in respect thereof that it is expedient to alter and amend the same and to extend the provisions thereof, and to put the law on a clear and certain basis: Be it, therefore, enacted that, from and after the passing of this Act, any agent who shall hereafter be entrusted with the possession of goods or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement *by way of pledge*, lien or security *bonâ fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance or payment made upon the security of such goods and documents, as also for any further or continuing advance in respect thereof; and such contract or agreement shall be binding upon and good against the owner of such goods and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made, is only an agent."

1851.
NAVULSHAW
v.
BROWNIGG.

The third section is as follows: "Provided always and be it enacted that this Act and every matter and thing herein contained, shall be deemed and construed to give validity to such contracts and agreements only, and to protect only such loans, advances and exchanges as shall be made *bonâ fide and without notice that the agent making such contracts or agreements as aforesaid, has not authority to make the same, or is acting malâ fide* in respect thereof against the owner of such goods and merchandize; and nothing herein contained, shall be construed to extend to or protect any lien or pledge for or in respect of any antecedent debt owing from any agent to any person with or to whom such lien or pledge shall be given, *nor to authorize any agent entrusted as*

1851.
NAVULSHAW
v.
BROWNRIGG.

aforesaid in deviating from any express orders or authority received from the owner ; but that, for the purpose and to the intent of protecting all such bonâ fide loans, advances and exchanges as aforesaid, (though made with notice of such agent not being the owner, but without any notice of the agent's acting without authority) and, to no further or other intent or purpose, such contract or agreement as aforesaid shall be binding on the owner and all other persons interested in such goods."

At the hearing of the Cause,

Mr. *Bethell* and Mr. *Lewis*, for the Plaintiff, said that the 6 Geo. IV. c. 94 gave validity to contracts for the sale of goods, made with an agent or consignee, notwithstanding the purchaser might know, at the time when he entered into the contract, that the vendor was not the owner of the goods, but only an agent: that the 5 & 6 Vict. c. 39 was passed in order to give the same validity to contracts by way of pledge, made with agents, as the Act of Geo. IV., had given to contracts for sale; and, accordingly, it enacted that an agent entrusted with goods, should be taken to be the owner of them so far as to give validity to any contract by way of pledge, *bonâ fide* made by any person with the agent, as well for any original loan made on the security of the goods, as for any further or continuing advance in respect thereof, and that such contract should be binding upon the owner, notwithstanding the pledgee might have had notice that the person with whom the contract was made, was only an agent: that the 3rd sect. of that Act provided that the Act should give validity to and protect only such loans as should be made *bonâ fide*, and *without notice that the agent had no authority to make the same*, or was acting *malâ fide* against the owner of the goods; and that it should not authorize the agent to

1851.

NAVULSHAW
v.
BROWNRIGG.

deviate from any express orders or authority received from the owner of the goods: that *Brownrigg and Co.*, shortly before they delivered the pearls to *Collet and Co.*, informed *Collet and Co.*, that they expected to receive a parcel of pearls, from *India*, for sale; and, therefore, *Collet and Co.* had notice (if not actual, at least constructive) that *Brownrigg and Co.* were in possession of the goods as agents and as agents to sell, and not to deposit them; and consequently the transaction between them in May 1847, was not a *bonâ fide* one, and therefore, was not protected by the Act of Parliament: that if *Collet and Co.* had not notice, when they received the pearls and accepted the bill for 2000*l.*, that *Brownrigg and Co.* had authority only to sell the pearls, they had most explicit notice of that fact, before they accepted either of the bills for 1680*l.*; for, before that time, they had seen the invoice, which stated that the pearls were consigned to *Brownrigg and Co.*, for sale on the Plaintiff's account; that the first bill for 1680*l.* was accepted, not in pursuance or in continuation of the original contract between the parties, but in pursuance of a new contract; and, as that contract was entered into, by *Collet and Co.*, with notice that *Brownrigg and Co.* had authority to sell the pearls, but had no authority to pledge them, it was made *malâ fide*, and consequently, the Act of the Queen did not protect it. Secondly, that the sale of the pearls, by *Collet and Co.*, by private contract, immediately after *Forbes and Co.* had applied to *Brownrigg and Co.*, for them, showed that *Collet and Co.* and *Brownrigg and Co.* were in league with each other and that there was a fraud between them; and, therefore, though the Plaintiff might recover the proceeds of the pearls at law, he had also a right to sue for them in a Court of Equity. Thirdly, that, at all events, the bill was sustainable as a bill by a principal against his agent, for an account.

1851.
 NAVULSHAW
 v.
 BROWNRIGG.

The cases cited were, *Lickbarrow v. Mason* (a), *Martini v. Coles* (b), *Evans v. Truman* (c), *Colt v. Woollaston* (d), and *Blain v. Agar* (e).

Mr. *Malins* and Mr. *C. Hall*, appeared for *Brownrigg and Co.*: and

Mr. *James Parker*, Mr. *Rolt* and Mr. *Goldsmid*, for *Collet and Co.*

Mr. *Bethell* replied.

The VICE-CHANCELLOR:

I feel myself warranted in giving my judgment immediately upon this case, though it is an important one; because, as some days have elapsed since the case was first discussed, I have had the opportunity of turning it in my mind; and the conclusion which I have arrived at is that the Plaintiff is not entitled to any relief whatever: and I have arrived at that conclusion without any doubt.

The Plaintiff's Counsel contended (indeed it was the main foundation on which their argument rested) that there was an inconsistency between goods being deposited with a factor for sale, and his having authority to pledge them. I see no such inconsistency. I think that there was that which would have satisfied me that there was notice, before the bill for 2000*l.* was accepted, that the pearls were in the hands of Messrs. *Brownrigg and Company* for sale. I have not, however, made up my mind on that point; because it does not appear to me to be very important. I think there certainly was

(a) 1 H. Blackst. 362.

(d) 2 P. Wms. 154.

(b) 1 Mau. & Selw. 140.

(e) 1 Sim. 37.

(c) 2 Barn. & Adol. 886.

1851.
 NAVULSHAW
 v.
 BROWNRIGG.

such notice before either of the two subsequent bills, was accepted. And I confess that Mr. *Bethell* has a good deal shaken the opinion I had formed upon the question, whether it would necessarily follow that, if the transaction was sustainable as to the bill for 2000*l.*, it was also sustainable as to the bills for 1680*l.* However, I give no opinion on that question and for this reason ; because it appears to me that there was no notice whatever that could, by reasonable intendment, lead Messrs. *Collet and Company* to suppose that Messrs. *Brownrigg and Company* had not authority to pledge the pearls, either before they accepted the bill for 2000*l.* or either of the bills for 1680*l.* As to the two last bills, there certainly was notice to *Collet and Co.*, that Messrs. *Brownrigg and Co.* were agents for the sale of the pearls : but, in my opinion, that did not give them anything like notice that Messrs. *Brownrigg and Co.* had not authority to pledge the pearls : and I come to that conclusion on the following grounds. I believe that I should be putting upon the Act of Parliament a construction totally different from that which the Legislature intended it to receive, if I were to say that it meant to deal with two classes of deposits, by the owners of goods, with factors in *London* or other places, namely, one, a deposit of goods with an authority to sell them ; and the other, a deposit of goods with an authority to pledge them. I believe that it is a very rare transaction indeed for a merchant to consign goods to a factor merely that he may pledge them. That is not the course of dealing at all. What was in the habit of taking place was this : goods were consigned to factors for sale : the factors then became largely in advance to the owners of the goods ; and they used, before the Act authorized them to do so, to recoup themselves and put themselves in cash as well as they could, by pledging the goods. These were not valid transac-

1851.
NAVULSHAW
v.
BROWNRIGG.

tions. They had no authority by law so to do. To meet that case the Act of her present Majesty was passed; and, in my opinion, when that Act speaks of the ordinary practice, what it means is the ordinary practice of factors having goods for sale, raising money upon them by deposit. The Act of Parliament says: "Whereas advances on the security of goods and merchandize have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to *bonâ fide* advances upon goods and merchandize, as, by the said recited Act, is given to sales, and that owners intrusting agents with the possession of goods and merchandize or of documents of title thereto, should be, in all cases where such owners, by the said recited Act or otherwise, would be bound by a contract or agreement of sale, be, in like manner, bound by any contract or agreement of pledge or lien for any advances *bonâ fide* made on the security thereof;" and then it makes the enactments which have been referred to.

Now the transaction that gave rise to the present suit, was this. The Plaintiff consigned to Messrs. *Brownrigg and Co.* two boxes of pearls. The moment he consigned them, he drew on *Brownrigg and Co.*, for 2466*l.* I say the moment, because it is stated that the bills were drawn at the time of the shipment; and it is quite clear that *Brownrigg and Co.* had accepted them, before *Collet and Co.* accepted the bill for 2000*l.* drawn upon them by *Brownrigg and Co.* Therefore the position of *Brownrigg and Co.* was this: They had, in their hands, pearls to be sold for Mr. *Navulshaw*, and had come under liabilities, in respect of them, to the amount of 2466*l.*

1851.
NAVULSHAW
v.
BROWNRIGG.

which was supposed to be something less than would be produced by the sale of them. In that state of things they, not being the parties themselves to sell the pearls, send them, in the due and regular course of business, to Messrs. *Collet and Co.*, that they might do what was requisite; and thereupon Messrs. *Collet and Co.* make the advances to Messrs. *Brownrigg and Co.* In my opinion (if I am wrong in that I am quite wrong throughout) that was the very case which the Act of her present Majesty was meant to meet. Messrs. *Brownrigg and Co.* had rendered themselves liable for 2466*l.* It is true they had not paid that sum, and it turned out afterwards that they became insolvent, and therefore never did pay it; but they had rendered themselves liable to that amount: and, therefore, when they put the goods into the hands of the parties who were to sell them and receive the proceeds, they got what was, in fact, an advance made to them on account of those goods. In my opinion that was the precise case which the Act was meant to meet; and therefore, if I am right in that view of the case, there is nothing like *mala fides* in the transaction. There was notice that *Brownrigg and Co.*, the consignees and factors, held the goods for sale. But that was merely notice that they were factors; for every factor holds goods for sale. In at least ninety-nine cases out of a hundred goods put into the hands of a factor, are put into his hands for the purpose of sale, not for the purpose of raising money by way of pledge or deposit. *Collet and Co.* knew that the goods were to be sold, and the parties who put them into their hands, raised money on them, which I conceive to be a raising of money protected by the Act; and, consequently, there was nothing like fraud or *mala fides* in the transaction from the beginning to the end of it.

1851.
NAVULSHAW.
v.
BROWNRIGG

I have already stated that I feel inclined to think that there was sufficient information to fix *Collet and Co.*, before they accepted the 2000*l.* bill, with notice that the pearls were the pearls of a merchant in *India*, and that he had sent them to *Brownrigg and Co.* to be sold. It is true that they were not told that they were the same pearls as *Brownrigg and Co.* had said they expected to receive from *India* for sale; but there was quite enough to put *Collet and Co.* on inquiry. Therefore, if the Plaintiff's case depended on *Collett and Co.*'s having notice that the goods were in the hands of Messrs. *Brownrigg and Co.* for sale, I think that the original vice would taint the whole transaction. But as I think that there is no vice, it does not appear to me that I need go into the question, as to what is the effect on the other bills; because, though there is no doubt that, before *Collet and Co.* accepted those bills, they had notice that the pearls belonged to the Plaintiff and that he had consigned them to Messrs. *Brownrigg and Co.* for sale on his account; yet, as I am of opinion that there was no *mala fides* in the transaction, that inquiry becomes unimportant.

That being so, the only question is whether there is a case for an account. What was argued was that there was a case for an account, independent of this transaction; for that Messrs. *Brownrigg and Co.*, either alone or with Messrs. *Collet and Co.* were agents for the Plaintiff; and that this Court gives relief at the suit of a principal against his agent. If there had been anything of fraud in the transaction, that would have been so, though it was only a single transaction: but, in a case in which there is no fraud, not only all the authorities but all the text books show that this Court will not de-

cree an agent to account to his principal, unless the case is one which is not capable of being conveniently inquired into in a Court of Law. But this is, really, only one, single transaction. Mr. *Navulshaw* sent two boxes of pearls to Messrs. *Brownrigg and Co.* to sell them. They have sold them. There is nothing in the evidence to show that they have not sold them properly. They were to sell them either by public auction or by private sale, as they thought best. They put them up to public auction, and, having sold only a small portion, they afterwards did their best with the rest, and realized all that it was possible to realize. Therefore the money produced by the sales, is money had and received to the use of Mr. *Navulshaw*, and may be recovered in an action at law: and the consequence is that, on that ground also, the bill fails; and I must dismiss it, as against both sets of Defendants, with costs.

1851.
NAVULSHAW
v.
BROWNRIGG.

Mr. *Bethell*.—With reference to the costs of the suit, I ought to state to your Lordship that there are four members of the firm of *Brownrigg and Co.*, and that every one of them has put in a separate answer.

Mr. *C. Hall*.—It was necessary for them to answer separately; because they were in different parts of the country; one in *London*, one in *Devonshire*, one in *Liverpool* and the other in *Scotland*.

The VICE-CHANCELLOR.—The putting in of separate answers by the members of a firm, unless there is something to justify it, is, certainly, causing unnecessary expense; and therefore I shall direct the *Taxing Master* to inquire whether it was necessary for them to put in more than one answer, and to deal with the costs of the answers according to the result of that inquiry.

1851:
7th, 14th, and
26th June.

Agreement.
Construction.
Corporation.
Railway Com-
pany.
Specific per-
formance.

PRESTON v. THE LIVERPOOL, MANCHESTER,
AND NEWCASTLE-UPON-TYNE JUNCTION
RAILWAY COMPANY. *S.C. 17 Bea 117 & H.L.*
4 M.R. 383

THE bill which was filed, on the 21st of January 1851, against the Company and their Chairman, stated that, in 1845, two gentleman named *Harper* and *Yates* and other persons who were afterwards incorporated by the

H. and *Y.* and several other persons calling themselves *The Lancashire and North Yorkshire Railway Company*, introduced a Bill into Parliament for incorporating the Company and making their railway, which was intended to pass through the Plaintiff's estate, and near his residence. The Plaintiff prepared to oppose the Bill, but afterwards desisted, in consequence of *H.* and *Y.* having agreed with him, on behalf of the Company, that, in case the Company should, in the then or any subsequent session, obtain an Act of incorporation, they would pay the Plaintiff 1000*l.* for all lands required by them for making the railway, and 4000*l.* for residential injury, and 25*l.* for his personal expenses, and also that they would pay the expenses of his solicitor in the business. Afterwards that Company agreed to join with a rival Company, calling itself *The Liverpool, Manchester and Newcastle Company*, in applying for an Act for making a railway the line of which, so far as the Plaintiff's estate was concerned, was the same as the line of the *Lancashire and North Yorkshire Company*; and the two Companies agreed to adopt the agreement with the Plaintiff. The Act passed, and by it the two Companies were incorporated by the name of *The Liverpool, Manchester and Newcastle Railway Company*.

Held that the incorporated Company must be taken to be the parties on whose behalf *H.* and *Y.* entered into the agreement with the Plaintiff.

The Court also was of opinion that, as the Plaintiff had withdrawn his opposition to the Bill in Parliament, the Company, according to the true construction of the agreement, were bound to pay the sums agreed to be paid to him, although they had not taken possession of any part of his estate. But, the question as to the construction of the agreement being a legal one, a case was directed for the opinion of a Court of Law.

name of the *Liverpool, Manchester and Newcastle-upon-Tyne* Junction Railway Company, agreed to apply for an Act of Parliament to establish a railway to be called The *Lancashire and North Yorkshire* Railway, and that such persons were associated together, for that purpose, by the name of The *Lancashire and North Yorkshire* Railway Company. That, in the same year, divers other persons agreed to apply for an Act to establish a railway to be called The *Lievrpool, Manchester and Newcastle-upon-Tyne* Junction Railway Company. That *Harper* and *Yates* were shareholders in and directors of the intended *Lancashire and North Yorkshire* Company. That it appeared, from the plans published and deposited according to the standing orders of Parliament, that the line of the railway of the last-mentioned Company, was projected to pass through the Plaintiff's estate and within a short distance of his mansion-house called *Flasby Hall*, in a manner and direction injurious and objectionable. That, in 1846, the promoters of each of the railways introduced a Bill into Parliament for making their railway and incorporating their Company; and, about the same time, the promoters of another intended railway called, The *Northumberland and Lancashire* Junction Railway, introduced a Bill for incorporating that Company and making their railway. That the Plaintiff opposed the *Lancashire and North Yorkshire* Company's Bill, and prepared to present a petition, to the House of Commons, against it. That the promoters of and shareholders in that Company being desirous of avoiding the Plaintiff's opposition to their Bill, *Harper* and *Yates*, on behalf of themselves and such other promoters and shareholders, entered into the following agreement with the Plaintiff: "February 5th. 1846. Memorandum of agreement this day made between the executive directors of the *Lancashire and North York-*

1851.

PRESTON

v.

THE LIVER-
POOL, MAN-
CHESTER, AND
NEWCASTLE-
UPON-TYNE
JUNCTION
RAILWAY CO.

1851.

PRESTON

v.

THE LIVER-
POOL, MAN-
CHESTER AND
NEWCASTLE-
UPON-TYNE
JUNCTION
RAILWAY CO.

shire Railway Company of the one part, and *C. Preston* of *Flabys Hall* in the county of *York* Esq., of the other part. It is agreed that, on the following conditions, the said *C. Preston* will and does assent to the railway being made through his property, at *Flasby Hall*, as laid down in the deposited plans of the said Company; that, in case the said Company shall, in this or any subsequent session, obtain an Act of incorporation, the said Company shall pay, to the said *C. Preston*, his heirs or assigns, the sum of 1000*l.* for all lands required by the Company for due making of the railway, and a further sum of 4000*l.* for residential injury to the estate and hall of the said *C. Preston*: that the Company shall pay the expenses of Mr. *Preston's* solicitor in this business, and 25*l.* for his own personal expenses.

The bill next stated that, immediately upon the execution of the agreement, the Plaintiff assented to the line of the *Lancashire* and *North Yorkshire* Company being made through his estate as laid down in the plans deposited by that Company. That, after the entering into of the agreement, that Company and the *Liverpool, Manchester* and *Newcastle-on-Tyne* Junction Company agreed together to abandon the line projected by the last-mentioned Company, and to jointly apply for an Act to authorize the making of the railway after mentioned, being part of the railway proposed by the *Lancashire* and *North Yorkshire* Company as aforesaid and which passed through the estate of the Plaintiff as aforesaid: That the Act so jointly applied for, passed on the 26th of June 1846, and was intituled, "An Act for making a Railway to be called The *Liverpool, Manchester* and *Newcastle-upon-Tyne* Junction Railway, with a Branch to the Town of *Hawes*;" and after reciting that several persons had united themselves into a Company, for the purpose

of carrying the railway into effect, under the name of The *Lancashire and North Yorkshire* Railway; and that several other persons had united themselves into a Company, for the purpose of making a railway under the name of The *Liverpool, Manchester and Newcastle-upon-Tyne* Junction Railway, the object of which last-mentioned railway, would be satisfied by the formation of a line of railway between the places therein mentioned, in the direction proposed by the *Lancashire and North Yorkshire* Company, together with a branch therefrom to *Hawes*, and that the said two Companies were willing, jointly, to carry into effect the therein first-mentioned railway together with the said branch, the Act enacted that *Harper and Yates* and four other persons therein named and all other subscribers to either of the two last-mentioned railways, should be united into a Company for making and maintaining the railway authorized by the Act, and should be incorporated by the name of The *Liverpool, Manchester and Newcastle-upon-Tyne* Junction Railway Company: That one-half of the shares in the Company should be distributed among the persons who, on the 1st of April preceding the passing of the Act, were subscribers to the *Lancashire and North Yorkshire* Railway, and the other half, amongst the persons who, at the same time, were subscribers to the *Liverpool, Manchester and Newcastle-upon-Tyne* Junction Railway; and that *Harper and Yates* and ten other persons, should be the first directors of the Company: and, after reciting that plans and sections of the railway, showing the line and levels thereof, and books of reference thereto, containing the names of the owners, lessees and occupiers of the land through which it was intended to pass or which might be required for the purposes thereof, had been deposited, under the name of The *Lancashire and North Yorkshire* Railway, with the clerks

1851.

PRESTON

v.

THE LIVER-
POOL, MAN-
CHESTER AND
NEWCASTLE
UPON-TYNE
JUNCTION
RAILWAY CO.

1851.

PRESTON

v.

THE LIVER-
POOL, MAN-
CHESTER AND
NEWCASTLE-
UPON-TYNE
JUNCTION
RAILWAY CO.

of the peace for the West and North Ridings of *Yorkshire*; and that plans and sections of the branch railway to *Hawes*, as forming part of the *Liverpool, Manchester and Newcastle-upon-Tyne Junction Railway*, and books of reference to such plans, had been deposited with the same clerks of the peace, it was enacted that it should be lawful for the said Company to make the said railway and branch in the line and upon the lands delineated in the plans and described in the books of reference, and to take and use such of the said lands as should be necessary for such purpose: and the Act further enacted that the powers of the Company for the compulsory purchase of land, should not be exercised after three years from the passing of the Act; and that, after the expiration of seven years from the same time, all the powers thereby granted to the Company for making the railway, should cease.

The bill next stated that parts of the Plaintiff's estate were delineated in the maps and plans and described in the books of reference deposited with the clerk of the peace for the West Riding, and were therein numbered 1, 2, 3, 4, &c., &c. That, previously to the incorporation of the *Liverpool, Manchester and Newcastle-upon-Tyne Junction Railway Company*, the promoters and shareholders of that Company, and the promoters and shareholders of the *Lancashire and North Yorkshire Company*, both at meetings of their respective directors, and at general meetings of their respective shareholders, approved of and adopted the agreement with the Plaintiff, amongst other agreements; and that it was one of the terms of the agreement between the promoters of those Companies in consequence of which they jointly applied for and obtained the Act of Parliament, that the Company incorporated as aforesaid, should be liable to the

*performance of all the agreements entered into, with landowners, by the promoters of the Lancashire and North Yorkshire Company, and, particularly, the agreement with the Plaintiff; and the Act was passed by the Legislature, and the Plaintiff and other landowners withdrew their opposition to it, upon the faith that the agreements with them would be observed, and that the incorporated Company would perform those agreements: and that, after the incorporation of the Company, the directors and shareholders of it, at various meetings and otherwise, approved of and adopted all the agreements with landowners, and especially the agreement with the Plaintiff: That, on the 24th of March 1846, C. M. Wilson who was the secretary to the Lancashire and North Yorkshire Company when that agreement was entered into, sent the Plaintiff a cheque for 25*l.*, enclosed in a letter which expressed that sum to be the amount agreed to be paid, on account of the Plaintiff's personal expenses, by the agreement of February 1846: that, on the 21st of December 1846, C. M. Wilson, who was appointed secretary to the Liverpool, Manchester and Newcastle-upon-Tyne Company after its incorporation, sent a notice to the Plaintiff, that the Company would, by their engineers, surveyors, agents and servants, after the expiration of three days from the service of the notice, enter upon the Plaintiff's lands, or the lands in his occupation, in the parish of Gargrave and township of Flasby, which would be required for the purposes of the said Company, for the purpose of surveying and taking levels of such lands, and of probing or boring to ascertain the nature of the soil, and of setting out the line of the works; and that they entered and set out the line in accordance with such notice, and that the line still remained set out, and the pieces of land intended to be purchased by the Company under the agreement, defined*

1851.

PRESTON

v.

THE LIVER-
POOL, MAN-
CHESTER AND
NEWCASTLE-
UPON-TYNE
JUNCTION
RAILWAY CO.

1851.

PRESTON

v.

THE LIVER-
POOL, MAN-
CHESTER AND
NEWCASTLE-
UPON-TYNE
JUNCTION
RAILWAY CO.

and ascertained; but the Company had never been in possession of those pieces of land, though the Plaintiff had always held the same at their disposal and was willing, at any time, to deliver up possession thereof to them, upon their paying him the purchase-money and costs agreed to be paid by the agreement.

The bill then set forth certain letters which were written, in 1848, by the solicitors of the incorporated Company, to the Plaintiff, soliciting him, in respect of his interest under the agreement, to oppose, (but at the Company's expense,) a Bill for dissolving the Company which certain persons had brought into Parliament. One of those letters enclosed a petition against the Bill, and contained a request that the Plaintiff would sign it, as being one of the persons who had entered into special contracts with the Company: and the bill stated that the Plaintiff signed the petition and returned it to the writer of the letter; and that it was afterwards presented to Parliament and that the Bill was rejected.

The bill, after stating that the Company pretended that the agreement was not binding upon them because it was entered into before their incorporation, charged that it was binding on them in equity if not at law, and that the *Lancashire* and *North Yorkshire* and the *Liverpool, Manchester and Newcastle-upon-Tyne* Junction Companies obtained the withdrawal of the Plaintiff's opposition to the Act by which they were incorporated, on the faith that the agreement would be performed on their part; and that the non-performance of the agreement would be a fraud upon him; That it was part of the terms of the amalgamation of the two Companies, that the Company for the incorporation whereof they jointly applied for an Act of Parliament, should be liable

to perform all the contracts entered into between the *Lancashire and North Yorkshire Company* and the land-owners upon that part of their line which was adopted by the incorporated Company, or, at all events, the contract between the Plaintiff and the *Lancashire and North Yorkshire Company*: *That the Liverpool, Manchester and Newcastle-upon-Tyne Junction Company had, since their incorporation, recognised and acted upon the agreement with the Plaintiff*, in the manner before mentioned in the bill and otherwise. That the Company were making endeavours to complete their railway, by means of a loan or of some arrangement with some other Company or proposed Company: That they had recently obtained, from the Commissioners of Railways, an extension of the time limited by the Act for the completion of their railway and for the compulsory purchase of the lands thereby authorized to be taken, and that the extended time had not expired: That the expenses of the Plaintiff's solicitor which, by the agreement, were stipulated to be paid by the *Lancashire and North Yorkshire Company*, had never been paid, and the Plaintiff remained liable to pay them.

1851.
PRESTON
v.
THE LIVER-
POOL, MAN-
CHESTER AND
NEWCASTLE-
UPON-TYNE
JUNCTION
RAILWAY CO.

The bill prayed that the agreement with the Plaintiff might be declared to be binding upon the *Liverpool, Manchester and Newcastle-upon-Tyne Company*; and that they might be decreed to complete the purchase of the pieces of land agreed to be purchased and set out as aforesaid, and all other, if any, the land required by them for making the railway, by paying the Plaintiff the sums of 1000*l.* and 4000*l.*, and the expenses of the Plaintiff's solicitor mentioned in the agreement, and to enter into possession of such land.

The Company demurred generally.

1851.

PRESTON

v.

THE LIVER-
POOL, MAN-
CHESTER AND
NEWCASTLE-
UPON-TYNE
JUNCTION
RAILWAY CO.

Mr. *Bethell* and Mr. *Hamilton Humphreys*, in support of the demurrer, contended that the agreement which the bill sought to enforce against the Defendants, the incorporated Company, was not binding upon them; because it was entered into, not on their behalf, but on behalf of a contemplated Company which never came into existence, and which the incorporated Company did not represent, or, at the utmost, represented in part only; for it adopted not the whole, but only a small portion of the contemplated Company's line; and there was no enactment in the Act as stated in the bill, which rendered agreements entered into on behalf of the contemplated Company, binding upon the incorporated one: that the cases in which incorporated Companies had, of late years, been held by this Court, to be bound by contracts entered into before they came into existence, proceeded upon their having recognised, retrospectively, the agency of the parties who had entered into the contracts, by taking the benefit of the contracts, and, thereby, adopting them: but a contract entered into on behalf of a Company before it came into existence, had never been held to be binding upon the Company unless it had taken the benefit of the contract after its incorporation: that the agreement sought to be enforced was purely executory, and was not intended to be binding even upon the contemplated Company, unless that Company not only obtained an Act of incorporation, but required and took possession of the Plaintiff's land for the due making of their intended railway: that if, under the circumstances of the case, the incorporated Company should be held to represent the contemplated one, and the agreement should be held to have been entered into on its behalf, still it had never adopted the agreement; it had never taken possession of, and might never require the Plaintiff's land, for the due making of the railway: that

the agreement did not *bind* the Company to make their railway through the Plaintiff's land; and the true construction of it was that neither the 1000*l.* nor the 4000*l.* were to be paid to the Plaintiff, unless and until the Company not only obtained an Act of incorporation, but also required and took possession of the Plaintiff's land: and that, until they did so, there was no consideration for the payment of the money.

1851.
PRESTON
v.
THE LIVER-
POOL, MAN-
CHESTER AND
NEWCASTLE-
UPON-TYNE
JUNCTION
RAILWAY CO.

The *Solicitor-General*, Mr. *Southgate* and Mr. *Preston* supported the bill.

The following cases were referred to in the course of the argument: *Columbine v. Chichester* (a), *Edwards v. The Grand Junction Railway Company* (b), *Stanley v. The Chester and Birkenhead Railway Company* (c), *Simpson v. Lord Howden* (d) and *Bland v. Crowley* (e).

The VICE-CHANCELLOR:

16th June.

This was a demurrer to a bill seeking to enforce, against the Defendants, The *Liverpool, Manchester and Newcastle-upon-Tyne* Railway Company, an agreement of the 5th of February 1846, which had been entered into between the Plaintiff and two gentlemen named *Harper* and *Yates*. The bill states that, in the year 1845, *Harper*, *Yates* and others projected a railway that was to be called The *Lancashire and North Yorkshire* Company, and for making which they required lands of the Plaintiff, and which was intended to pass near his residence of *Flasby Hall*. In 1846, they introduced a Bill into Parliament

(a) 2 Phill. 27.

(d) *Ibid.* 97.

(b) 1 Myl. & Cr. 650.

(e) Decided in the Court

(c) 9 Sim. 246 and 3 Myl. & Cr. 773.

of Exchequer in May 1851, but not yet reported.

1851.
 PRESTON
 v.
 THE LIVER-
 POOL, MAN-
 CHESTER AND
 NEWCASTLE-
 UPON-TYNE
 JUNCTION
 RAILWAY CO.

for the purpose of establishing that railway. The Plaintiff prepared to oppose it ; and, in order to prevent the Plaintiff's opposition, the following agreement was entered into :—" Memorandum of agreement this day made between the executive directors of the *Lancashire and North Yorkshire* Railway Company of the one part, and *C. Preston of Flasby Hall* in the county of *York*, Esq., of the other part : It is agreed that, on the following conditions, the said *C. Preston* will and does assent to the railway being made through his property at *Flasby Hall*, as laid down in the deposited plans of the said Company : that, in case the said Company shall, in this or any subsequent session, obtain an Act of incorporation, the said Company shall pay to the said *C. Preston*, his heirs or assigns, the sum of 1000*l.* for all lands required for due making of the railway, and a further sum of 4000*l.* for residential injury to the estate and hall of the said *C. Preston* : that the Company shall pay the expences of *Mr. Preston's* solicitor in this business, and 25*l.* for his own personal expences."

In the same session, certain other projectors introduced, into Parliament, a Bill for a rival line, to be called The *Liverpool, Manchester and Newcastle Junction* Railway, and a third set of projectors brought in a Bill for another rival line, to be called The *Northumberland and Lancashire Junction* Railway. This third line, however, need not be considered. As far as I understand nothing turns on it. The projectors of the first two lines, that is the *Lancashire and North Yorkshire* and the *Liverpool, Manchester and Newcastle* line, agreed to unite and form a line which should, so far as relates to the Plaintiff's lands, follow the line proposed by the *Lancashire and North Yorkshire* Company ; and they expressly agreed to adopt the contract of the 5th of February 1846, on

the faith of which the Plaintiff withdrew his opposition. I have taken all these facts from the statements in the bill. On the 26th of June 1846, an Act passed incorporating this new Company by the name of *The Liverpool, Manchester and Newcastle Junction Railway Company*. The books deposited with the clerks of the peace and referred to in the Act, enumerate several fields of the Plaintiff, through which the line of the railway was to pass. The Defendants, after the passing of the Act, set out the line of the railway over the Plaintiff's lands and gave notice that they should require the same; but they have never taken possession thereof, though the Plaintiff has always been ready to give up the same. The object of the present suit, is to enforce performance of the agreement and to obtain payment of the 1000*l.* and 4000*l.*

1851.
 PRESTON
 v.
 THE LIVER-
 POOL, MAN-
 CHESTER AND
 NEWCASTLE-
 UPON-TYNE
 JUNCTION
 RAILWAY CO.

The Plaintiff says that the contract of *Harper* and *Yates*, is binding, in equity, on the Defendants. The doctrine of the Court on this subject, is that, where projectors of a Company enter into contracts on behalf of a body not existing at the time of the contract, but to be called into existence afterwards, there, if the body for whom the projectors assumed to act, does come into existence, it cannot take the benefit of the contract without performing that part of it which the projectors undertook that it should perform; that is, in substance, this Court treats the projectors, for that purpose, as agents of the Company so afterwards called into existence. The Plaintiff says that, according to this doctrine, the contract of February 5th 1846, is binding on the Defendants. The Defendants object on two grounds; first, they say they are not the parties for whom *Harper* and *Yates* were acting; and, secondly, that they have not taken the benefit of the contract.

1851.
 PRESTON
 v.
 THE LIVER-
 POOL, MAN-
 CHESTER AND
 NEWCASTLE-
 UPON-TYNE
 JUNCTION
 RAILWAY CO.

On the first point, I think the Defendants clearly are the parties, within the principle of the rule of equity, on whose behalf *Harper* and *Yates* must be taken to have made the contract. It is true that it was originally made on behalf of a different body : but the promoters of the two rival lines afterwards coalesced and agreed to concur in obtaining an Act for a line which should adopt that part of the line which traversed the Plaintiff's land, and should, for that purpose, adopt (*inter alia*) the contract of *Harper* and *Yates* : and the Plaintiff, on the faith of that, withdrew his opposition. I think this puts matter exactly in the same position as if the contract had been between the Plaintiff of the one part, and *Harper* and *Yates* as agents for the Company which was afterwards incorporated, that is, the Defendants, of the other part. The same persons who entered into the agreement as projectors, also obtained the Act which passed. Others, it is true, concurred with them, and the name of the Company was changed. But in substance, as far as the Plaintiff was concerned, that made no difference. The projectors who made the contract with him, united with others ; and then, the united projectors adopted the original contract ; and the Plaintiff, thereupon, abstained from opposition. I think this clearly entitled the Plaintiff to look to the Defendants as the parties liable to him ; that is, as the parties on behalf of whom *Harper* and *Yates* made the contract. The case of *Stanley v. The Chester and Birkenhead Railway Company*, is strongly in point, if, indeed, authority is necessary.

The real difficulty is in the second point ; whether the Defendants have, in fact, taken the benefit of the contract. This depends on its construction. If the meaning of the contract is that, in consideration of the Plaintiff assent-

ing to the Bill, the Defendants, on obtaining their Act, would pay him the two sums of 1000*l.* and 4000*l.* or either of them, then they have had the benefit of the contract: for they have bought off the Plaintiff's opposition. If the meaning is that, in case the Defendants should obtain their Act, and also require the Plaintiff's land, the Plaintiff would sell to them what they might require, at the price and on the terms stipulated in the contract, then the Defendants have not had the benefit of the contract: for they have taken no lands. But I think this is not the meaning. It could hardly be that, if the Company took anything, however small, they were to pay 5000*l.* as the consideration for what they took, otherwise nothing. Whereas there is no inconsistency in supposing that the Defendants agreed to pay the 5000*l.* in case the Act passed, as the consideration for the Plaintiff's consent, and as the price of the land required. The language here is not, it is true, precisely the same as in the recent case of *Bland v. Crowley*, in the Exchequer, to which reference was made in the argument. But I think that, in substance, it means the same thing; that is, the consideration in both cases, was made up, in part, of the assent of the landholder to the passing of the Act. The value of that assent could not, from the nature of things, be nicely or accurately calculated. There was, therefore, nothing anomalous in stipulating for a fixed sum to be paid for the benefit of that assent, including also what was matter of lesser moment; namely, the price of the land through which the railway should pass, whether, for that purpose, more or less might be required. But it could hardly have been intended that, without reference to the advantage of obtaining the Plaintiff's assent to the Bill, the Company should, before they got their Act, have stipulated

1851.
 PRESTON
 v.
 THE LIVER-
 POOL, MAN-
 CHESTER AND
 NEWCASTLE-
 UPON-TYNE
 RAILWAY CO.

1851.

PRESTON

v.

THE LIVER-
POOL, MAN-
CHESTER AND
NEWCASTLE-
UPON-TYNE
JUNCTION
RAILWAY CO.

to pay 5000*l.* if they should take any portion of the Plaintiff's land, whether a single rood or the whole which was delineated on the map ; but if, instead of taking any of this land, they should just skirt outside his boundary, occasioning probably, just as much annoyance to his residence, then they should pay nothing. This could not, I think, have been what was intended ; and, therefore the contract must be read as a contract to pay 1000*l.* and 4000*l.* as the price of the Plaintiff's assent and of so much of his land as should be required for the line, including compensation for what is called residential injury.

It follows, from this construction of the contract, that the demurrer must be overruled ; for the Defendants are, as I have already stated, bound by the contract of *Harper and Yates* ; and they have, in part, had the benefit of it. But I must add that the question as to the meaning of the contract is a mere legal question ; and, therefore, I shall not overrule demurrer, without giving the Defendants the opportunity, if they wish it, of taking the opinion of Court of Law on the construction of the contract. This can readily be done. For, if I am right in my construction of the contract, the Plaintiff has a present right of action against *Harper and Yates*. I do not mean that any action should be brought ; but that a case should be stated, the question being whether, the Act of Parliament having passed, and the Defendants having done the acts stated in the bill, the Plaintiff has any present right of action against *Harper and Yates*.

This being my view of the contract, I am not obliged to decide how far the contract to pay the costs of the Plaintiff's solicitor, would have enabled him to sustain

the bill. But I do not think it would. The bill contains no statement as to the nature or amount of the bill, nor any averment that a bill has been delivered, or that payment of it has been demanded and refused. I think this was essential. It would be very oppressive, on the Defendants, to hold them liable for a bill of costs which has never been delivered; and, therefore, even independent of the statute which requires the delivering of a signed bill, I should not have sustained the Plaintiff's bill on this ground.

1851.
 PRESTON
 v.
 THE LIVER-
 POOL, MAN-
 CHESTER AND
 NEWCASTLE-
 UPON-TYNE
 JUNCTION
 RAILWAY CO.

The Defendant's Counsel having said that they would take a case for the opinion of the Judges of the Court of Queen's Bench,

His Lordship said that, that being so, he should not do, what he should otherwise have done, namely overrule the demurrer, but should suspend his order upon it until he got the opinion of the Court of Law.

1851:
3rd July.

Joint-stock Companies Winding-up Acts.
Contributory.

IN THE WINDING-UP OF THE DIRECT
BIRMINGHAM, OXFORD, READING AND
BRIGHTON RAILWAY COMPANY.

BRIGHT'S CASE.

A. had been a member of the provisional committee and had accepted shares in a Company which was ordered to be wound up. The Master placed *A.*'s name on the list as a contributory to the expenses of the committee incurred between the 14th October 1845, the day on which he accepted

his shares, and the 30th of November 1845, on or before which day the Company ought, according to the standing orders, to have deposited their plans &c. in order to obtain an Act of incorporation in the then next session. But they did not do so; nor did they, after that day, take any steps towards the establishment of the Company.

Held that *A.* was liable to contribute to the expenses incurred between the 14th of October and 30th November 1845, both inclusive; but was not liable to contribute to the expenses incurred before the former day or after the latter.

MR. BRIGHT had been a member of the provisional committee and had accepted shares in the above-mentioned provisionally registered Company; and, therefore, according to the decision of the House of Lords in *Upfill's case (a)*, he was liable to pay his rateable proportion of the necessary expenses of the committee *incurred in preparing to launch the common concern*. According to the standing orders of Parliament, the Company, in order to obtain an Act of incorporation in the then next session, ought to have deposited their plans, sections and books of reference on or before the 30th of November 1845; but they did not do so; nor did they take any steps, after that day, towards the establishment of the Company.

(a) 2 Ho. of Lords Cases, 674.

Under those circumstances, the *Master* charged with the winding-up of the Company, considered that the expenses of preparing to launch the concern, were those which were incurred up to and inclusive of, but not subsequently to the 30th of November 1845; and he placed Mr. *Bright's* name on the list as a contributory to the expenses incurred between the 14th of October 1845, when Mr. *Bright* accepted his shares, and the 30th of November 1845, both inclusive.

1851.
BRIGHT'S
CASE.

Both the official manager and Mr. *Bright* were dissatisfied with what the *Master* had done, and a motion was now made, on behalf of the official manager, that the *Master's* report, so far as it declared that *Bright* was liable to pay his rateable proportion of the expenses of preparing to launch the concern incurred between the 14th of October and the 30th of November 1845, both inclusive, might be reversed; and that it might be declared that *Bright* was liable to pay not only a rateable proportion of the expenses incurred between those days, but also a rateable proportion of the expenses incurred before the 14th of October and after the 30th of November 1845, down to the final abandonment of the Company. At the same time a motion was made, on behalf of Mr. *Bright*, that an order for a call of 10*l.* per share, which the *Master* had made on certain of the contributories including Mr. *Bright*, might be discharged, on the ground that Mr. *Bright* had never authorized the incurring of any of the expenses of the Company.

Mr. *Bethell* and Mr. *Roxburgh* appeared for the official manager.

Mr. *Cooper* and Mr. *Morris* for Mr. *Bright*.

1851.

**BRIGHT'S
CASE.**

The VICE-CHANCELLOR said that the *Master* had rightly considered the 30th of November 1845, as the day up to and inclusive of which the committee were preparing to launch the common concern, and had rightly held, according at least to the decision in *Upfill's case*, that Mr. *Bright* was liable to contribute to the expenses incurred between the 14th October and the 30th November 1845 both inclusive, but was not liable to contribute to the expenses incurred prior to the former or subsequently to the latter day: and he refused both the motions with costs.*

* Both parties have appealed to the House of Lords.

IN THE MATTER OF THE WINDING-UP
ACTS AND OF THE CHESTER AND MAN-
CHESTER DIRECT RAILWAY COMPANY.

EX PARTE PHILLIPPS.

THIS was a petition presented by *H. Phillipps*, a soli-
citor in *London*.

It stated that the *Chester and Manchester Direct Railway Company* was projected and provisionally registered in 1845: that the capital was to be 1,000,000*l.*, and was to be divided into 50,000 shares of 20*l.* each: that the Petitioner and various other persons applied for shares, and the number so applied for greatly exceeded 50,000: that, on the 1st of September 1845, when the time for receiving applications for shares expired, the provisional committee resolved that only 30,000 should be allotted to the applicants, and that the remaining 20,000 should be reserved for future allotment either to themselves or to such other persons as they might, thereafter, think fit; and that every member of the committee should, at any time, be entitled to receive an allotment of 500 shares out of the 20,000 reserved; but the committee gave no notice of that resolution to the Petitioner or to any of the other applicants for shares: that, in pursuance of that resolution, the committee allotted 30,000 shares to several of the applicants, and, amongst them, 500 to the Petitioner: that, on the 15th of October 1845, the committee allotted 100 shares to every member of their own body, and such allotment

1851:
13th and 16th
June.

*Joint-stock
Companies
Winding-up
Acts.*

Winding-up
order refused,
on the ground,
(amongst
others) that a
suit was pend-
ing for the same
purpose.

1851.

EX PARTE
PHILLIPPS.

was accepted by the greater number of them ; but some declined it ; and that it was alleged, by the members of the committee, that they never exercised their option of taking 500 shares, and that they were not, for the purpose of the distribution of the assets of the Company as thereafter mentioned, to be considered as members of the Company for more than the shares actually accepted by them : that, subsequently, some other shares were allotted to other persons ; and the whole number allotted was 34,140, of which 33,028 were accepted ; but the remaining 15,860 were left unallotted, though the whole 50,000 had been applied for : that the committee did not inform the Petitioner or the other allottees, that so large a number of shares remained unallotted ; but, on the contrary, published two advertisements in *The Times*, one on the 10th of September 1845 stating that the committee of management had completed the allotment of shares, and the other on the 25th of the same month, stating that the shares had been allotted and all deposits duly paid : that the Petitioner, besides the shares allotted to him, purchased 720 from the proprietors thereof.

The Petition further alleged that the bill for making the railway was thrown out, owing to the standing orders of the House of Commons not having been fully complied with ; and, thereupon, the directors resolved to dissolve and wind up the Company ; and, on the 7th of April 1846, the committee of management informed the Petitioner and the other shareholders that, in consequence of their not having been able to comply with the Standing Orders, they were proceeding to ascertain the liabilities of the Company, with a view of informing the shareholders of the amount expended ; and that they trusted that, within a month, they should be enabled to give the

shareholders an accurate statement and take their opinion as to the future course of proceeding: that the directors convened a meeting of the shareholders, which was held on the 8th of May 1846, and a report, prepared by the directors, was read at the meeting, and by it the directors informed the shareholders, for the first time, that only 34,140 shares had been allotted, and they stated that, after deducting, from the sums paid in respect of deposits, the amount already expended and the probable amount of the liabilities of the Company, they estimated that they had funds in hand, available for the benefit of the shareholders, to the amount of about 1*l.* 1*s.* 6*d.* per share: that the meeting resolved that the report should be received *and the undertaking be dissolved and wound up*: that neither the Petitioner, nor *J. Lamert* nor *J. G. Frith* * thereinafter mentioned, was present at the meeting, or, in any way, sanctioned its proceedings: but a copy of the report and resolution was afterwards sent to the Petitioner and the other shareholders: that, on the 30th of June 1846, the directors informed the Petitioner and the other shareholders that, at a conference between the committee of management *and a committee appointed on behalf of the shareholders*, the amount of the money in the possession of the Company was stated, and the liabilities remaining due and owing were considered, and it was resolved that 1*l.* per share should be returned to the shareholders, and that a further *pro rata* division should be made of any balance of the funds of the Company which might remain after the claims should have been discharged; and that, at the same time, the directors requested the Petitioner and the other shareholders to transmit the scrip in their possession to

1851.

EX PARTE
PHILLIPPS.

* These two gentlemen were clients of the Petitioner and shareholders in the Company.

1851.

EX PARTE
PHILLIPPS.

the secretary of the Company; and sent them a form, to be signed by them and returned with their scrip, and stated that, in two days after the receipt of the scrip, a cheque would be forwarded to the shareholders: that the form for the return of the scrip was in the following words:—
“ To the directors of the late *Chester and Manchester* Direct Railway.—I herewith deliver to you scrip for shares in this Company, *for the purpose of being cancelled*, and request a cheque for 1*l.* per share, being the proportionate amount of deposit to be returned to me on the shares hereunder specified; and I agree to accept the said payment of 1*l.* per share *in full discharge of all claims upon the Company and directors for my share and interest in the said undertaking*, without prejudice, however, to my right to a further *pro ratâ* division of any balance of the funds of the Company which may remain after all claims shall have been discharged:” *That all the shareholders, either original or derivative, except the Petitioner and Lamert and Frith, signed and returned the form and delivered up their scrip to the directors, and received 1*l.* per share on the terms mentioned in the form*: that *Lamert* held 150 shares, and *Frith* held 100, which were originally allotted to them, and the former held 750 which he had purchased from the proprietors thereof: that the Petitioner and *Lamert and Frith* objected to the said proposition of the directors, and, in June 1846, the Petitioner sent a circular letter to the greater part of the directors, stating that he and *Lamert* intended to take proceedings for the recovery of the deposits paid on the shares allotted to and purchased by them.

The petition then set forth a correspondence which took place, in June and July 1846, between the Petitioner and Messrs. *Higson and Robinson*, the solicitors of

those directors to whom the circular letter had been sent, the result of which was that the Petitioner and his clients, *Lamert* and *Frith*, delivered up the certificates for their shares, and received 1*l*. per share; and the directors to whom the circular had been sent, agreed to pay them such further sums in respect of their shares as a barrister should award. The petition then stated that the Petitioner sent to *Higson and Robinson* the draft of an agreement for the reference, which was an agreement to refer all matters in difference, so as to include the claims of the Petitioner and *Lamert* and *Frith* in respect of their purchased as well as their original shares; but that *Higson and Robinson* altered the draft, so as to make it an agreement for a reference of the claims of the Petitioner and *Lamert* and *Frith* in respect of their original shares only; and that, *Higson and Robinson* having persisted in their refusal to frame the agreement so as to embrace the purchased shares, the agreement had never been carried out although the correspondence as to it, continued until 1848. The Petition then stated that the Petitioner and *Lamert* and *Frith* insisted that the amount which they were entitled to receive from the directors of the Company, ought not to be ascertained on the principle, proposed by the directors, of throwing all the expenses of the undertaking on the shares actually allotted and taken up, so as to make each share pay 1-33,028th part thereof, but that each of the shares of the Petitioner and *Lamert* and *Frith* ought to bear only 1-50,000th part of the expenses of the Company, or, at all events, that each member of the provisional committee ought to contribute, to the expenses of the Company, in respect of 500 shares; or, otherwise, that the Petitioner and *Lamert* and *Frith* ought to bear a less proportion of the said expenses,

1851.

EX PARTE
PHILLIPPS.

1851.

EX PARTE
PHILLIPPS.

than was thrown upon them by the directors: That the Petitioner and *Lamert* and *Frith* also objected to the allowance, to the directors, of various items of disbursement claimed by them, and, in particular, various large payments made by them to their engineers and solicitors; and to the allowance of a sum of 2680*l.* claimed by the directors, or some of them, as a proper disbursement, being the balance of monies expended, by some of the directors, in the purchase, in the market, of shares in the Company; and which application of the funds of the Company was wholly unauthorized: That, on the 13th of April 1849, *Lamert, by the Petitioner as his solicitor*, filed his bill of complaint* in the Court of Chancery, for the purpose of obtaining a distribution of the assets of the Company, and insisting that such distribution should be made on the principle aforesaid, and objecting to the said several sums so claimed by the directors: That several of the Defendants appeared to and answered the bill, and raised various objections as to parties; and the bill had been amended, and several of the Defendants thereto had answered the amended bill; but, by reason of the number of the Defendants, and the difficulty of discovering where several of them could be found for the purpose of service of process, and the bankruptcy, insolvency and death, from time to time, of some of the Defendants, it would be very difficult, if not impracticable, to bring the suit to a hearing: That, if the Company were wound up, under the provisions of the Winding-up Acts, according to the principles contended for by the Petitioner, a large sum of money would be found to be coming to him and *Lamert* and *Frith*, in respect of their shares, and a fur-

* The Defendants were persons who had been members of the provisional committee and directors of the Company.

ther *pro ratâ* division would also be made to the other shareholders in the Company.

The petition prayed that the Company might be wound up under the provisions of the Winding-up Acts; and that the Court would give such special directions respecting the several matters mentioned in the petition, and would make such further and other order in the premises, as to it should seem meet.

An affidavit in opposition to the petition, made by one of the Defendants to the before-mentioned suit, stated that all the shareholders in the Company, except the Petitioner and *Lamert* and *Frith*, had delivered up their scrip certificates to be cancelled, and received their 1*l.* per share, in accordance with the arrangement mentioned in the petition: that, at a board of the directors of the Company held on the 26th January 1847, *all the then remaining funds of the Company were appropriated to the discharge of the liabilities of the Company which remained unsatisfied, and the affairs of the Company were then declared to be finally wound up and closed*: that the deponent and the other parties to the agreement for the reference, had always insisted and still insisted that the draft of the agreement prepared on their behalf, was the one that properly carried out the contract for the reference, and that the draft prepared by the Petitioner, did not do so; and that the agreement to refer, still subsisted, though the formal agreement for reference, had not been settled: that the suit was instituted by *Lamert*, on behalf of himself and the other shareholders in the Company except the Defendants, *and in combination with the Petitioner and Frith*: that the bill in it stated the same case as was made by the petition, and prayed for an account of the deposits paid upon the shares in the Company, and of the expenses which had

1851.

EX PARTE
PHILLIPPS.

1851.

EX PARTE
PHILLIPPS.

been properly paid and incurred by the Defendants in the management of the Company; and that the proportion which ought to be borne by the Plaintiff and the other shareholders on whose behalf he was suing, might be ascertained; and that it might be declared that a proper proportion of such expenses ought to be borne and paid, by the Defendants, in respect of the 15,860 shares, or, otherwise, that each share in the Company belonging to the Plaintiff and those on whose behalf he was suing, might be declared to be liable to contribute 1-50,000th part thereof; and that an account might be taken of what was due, to the Plaintiff and the other shareholders on whose behalf he was suing, in respect of the deposits paid on their shares; and that the amount which should be found due to them, after deducting their proportion of the said expenses as aforesaid, might be repaid to them.

The affidavit further stated that the deponent and the other parties to the agreement of reference, put in their answers to the bill on the 1st November 1849, and fully answered the Plaintiff's charges as to all matters of fact, and relied upon such matters of defence as they were advised were tenable in law. The affidavit then set forth the material contents of the answers, from which it appeared that the Defendants thereby insisted that, by the effect of the resolutions at the meeting of the 8th of May 1846 and the proceedings subsequent thereto, the Company had been dissolved and finally wound up and closed, and that there were no shareholders whatsoever in the Company, and that the rights of the Plaintiff and of the Petitioner and *Fritch* under the agreement for reference, were not rights existing as between them and the Company, but only as between them and such of the directors who, individually, agreed to enter into the

reference; and that the Defendants submitted to perform the agreement of reference, and claimed the benefit thereof against the Plaintiff and the Petitioner and *Frith*; and insisted on the same as disentitling the Plaintiff to any relief in the suit; and that the Defendants stated that they were advised that such agreement alone regulated the mutual rights of themselves and the Plaintiff and the Petitioner and *Frith*; and that the suit was wholly unsustainable; and that no common right of suit existed between the Plaintiff and the other shareholders on whose behalf he assumed to sue.

1851.

EX PARTE
PHILLIPPS.

The affidavit further stated that, on the 18th February 1850, the Plaintiff, *in combination with* Lamert and Frith, amended his bill, by making it a bill on behalf of himself alone, and by making the Petitioner and *Frith*, and a shareholder named *Lewis*, who had delivered up his scrip certificates and received his 17. per share on the same terms as the other shareholders, additional Defendants, and charging that the other shareholders were too numerous to be made parties; and the affidavit stated that the amended bill prayed the like accounts as were asked by the original bill, except as respected the other shareholders on whose behalf the Plaintiff had formerly sued; and that it omitted the prayer for a declaration that a proper proportion of the expenses ought to be paid, by the Defendants, in respect of the 15,860 unallotted shares, and substituted a prayer for a declaration that the Plaintiff ought to be charged, in respect of each share, with one fifty-thousandth part only of the expenses, or, at all events, that the members of the provisional committee ought to contribute towards the expenses in respect of 500 shares each, or, otherwise, that the Plaintiff ought to be charged with a less proportion of the expenses than the directors sought to charge

1851.

**EX PARTE
PHILLIPPS.**

upon him. The affidavit further stated that the deponent and the other Defendants who had answered the original bill, answered the amended bill and again insisted that the agreement of reference was subsisting and binding, and disentitled the Plaintiff to relief in the suit: and that the answer stated that the petition, like the suit, was a concerted proceeding of the Petitioner and *Lamert* and *Frith* and also that all the debts of the Company had been long since paid, and *there were no subsisting debts, liabilities or assets of the Company; and that the Company was dissolved in May 1846, and finally wound up in January 1847; and that all the shareholders, except the Petitioner, and Lamert and Frith, had been settled with, and that the claim of those three, was the only subsisting claim, of any kind, arising out of the Company's affairs, and that that claim was the subject of the agreement for reference.*

Mr. *Prior* supported the petition. Mr. *Stuart*, Mr. *Rolt*, Mr. *Bacon*, Mr. *Lloyd* and Mr. *Little* opposed it. They said that all the funds of the Company had been, long ago, distributed, and that the Company had been dissolved and its affairs wound up; that the Petitioner and his two clients, *Lamert* and *Frith*, were the only members of the Company who were dissatisfied with what had been done; that the suit must be taken to have been instituted by the Petitioner and *Frith* as well as by *Lamert*; that it was instituted after the Winding-up Act of 1848 was passed, and that the bill was amended and the answers to the amendments were enforced, after the Act of 1849 was passed; and that the decree in the suit would answer all the purposes of the winding-up order. *Deeks v. Stanhope (a).*

(a) *Ante*, p. 439.

Mr. *Prior*, in reply, said that *Vice-Chancellor Knight Bruce* had recently made the winding-up order, notwithstanding the pendency of a suit instituted by the very person who applied for the order; and that the petition in this case, and the affidavit in support of it, stated that it would be very difficult, if not impracticable, to bring the suit to a hearing. He added that, if the order was made, *Lamert* would undertake to dismiss his bill with costs.

1851.
EX PARTE
PHILLIPPS.

THE VICE-CHANCELLOR :

I do not think that I should exercise, wisely, the discretion with which I am intrusted, if I were to make the winding-up order in this case.

I admit that the member of a Company, the affairs of which are alleged to have been wound up, may say that they have not been regularly wound up; and that that will give him a *locum standi* in this Court. But still I must look at the circumstances of the case, in order to see whether it is a case in which, having regard to the interests of all the parties, I ought to make the order: and I think that, in this case, I clearly ought not: because I may be involving thousands of persons in proceedings which must lead to enormous expense: for, if I look at the Act of Parliament, I find that the *Master* is bound immediately to appoint an official manager; to make out a list of contributories, &c. &c. Those proceedings might be profitable to some persons; but, certainly, they would not be beneficial to the whole body; this being a case in which, whatever relief they may have, is relief against the directors personally, and for which there is already a suit pending in the Court. I consider *Phillipps* to be the same as *Lamert* here. Those two gentlemen and Mr. *Frith*,

1851.

EX PARTE
PHILLIPPS.

thought that what had been done with regard to the affairs of the Company, had been wrongly done. One, being a solicitor, has acted for the others. They have instituted their own proceedings, and must be considered as sailing in the same boat. I do not, however, mean to say that, if the Petitioner himself had been the Plaintiff in the suit, that circumstance alone, would have prevented my making the order.

I do not know what the case before *Vice-Chancellor Knight Bruce* was, but I am quite confident that that learned Judge could never have meant to decide that, if a man had filed a bill and gone on towards the hearing of the Cause, he might get a winding-up order as a matter of course.

Mr. *Prior*: What his Honour decided, was that, if it is a proper case for the winding-up order, the pendency of the suit does not prevent the order from being made.

The *Vice-Chancellor*.—That is, precisely, my opinion.

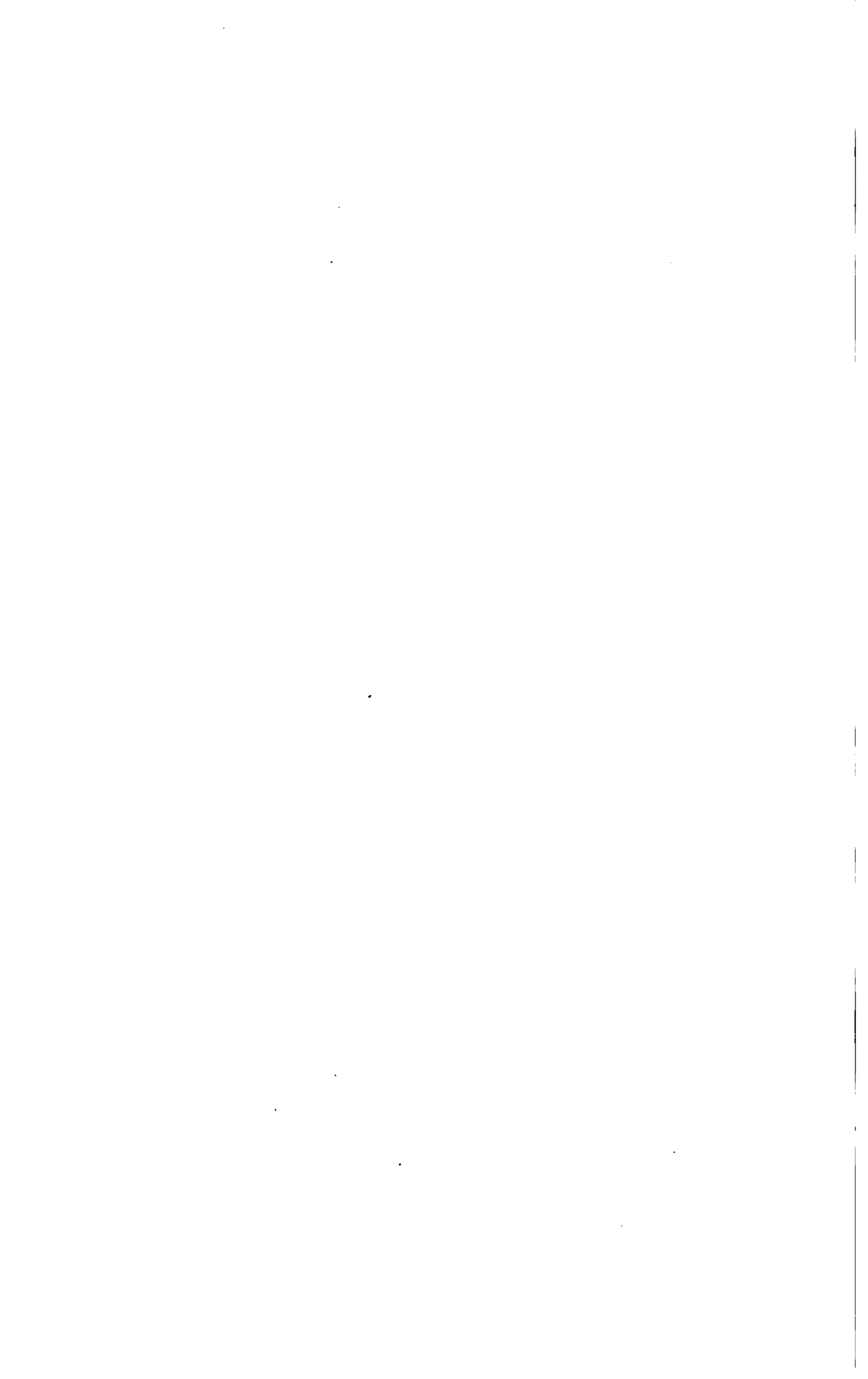
MEMORANDUM.

In October 1851, Vice-Chancellors Sir *James Lewis Knight Bruce* and Baron *Cranworth*, resigned their offices, on being appointed Lords Justices of the Court of Appeal in Chancery, under 14 & 15 Vict. c. 83.

They were succeeded by *R. T. Kindersley* Esq., a Master in Chancery, and *James Parker*, Esq., one of her Majesty's Counsel: and, shortly afterwards, those two gentlemen were knighted.

Stuart v. Lloyd, reported *ante* page 56, has been reversed: See 3 Macn. & Gord. 181.

In page 29, line 16 of the marginal note, for *B.* read *A.*



AN
INDEX
TO THE
PRINCIPAL MATTERS.

ACCEPTANCE OF SHARES.

See CONTRIBUTORY, 2, 5, 7, 10.

ACCOUNT.

See FACTOR.

ACCUMULATION.

A direction in a will to accumulate the income of trust funds for twenty-one years after the testator's death, and, at the expiration of that term, during the minorities of the persons entitled under the trusts. Held to be good only for the twenty-one years. [*Wilson v. Wilson*] 288

AGENT.

See AGREEMENT, 2.—PRINCIPAL AND AGENT, 1, 2.

AGREEMENT.

1. Injunction to restrain the Defendants from entering into an agreement with another railway company, which would be a violation of or inconsistent with a subsisting agreement between the Plaintiffs and the Defendants, refused; the inconvenience to arise from granting the injunction being greater than the inconvenience to arise from refusing it. In what cases the

Court will interfere to preserve property in litigation, *in statu quo*. [*Shrewsbury and Chester v. Shrewsbury and Birmingham Railway Company*] 410

2. A railway company constituted under an Act of Parliament, agreed with two other railway companies, that *the whole concern*, without incumbrance, when completed, should be *worked by those two companies*, who should have *perfect control and exercise all the rights* of the first-mentioned company, and who should find stock, and *work the concern for twenty-one years*. Held that the agreement was illegal, as being in violation of the Act under which the first-mentioned company was constituted; and that, though a very large majority of the shareholders present at a meeting, had sanctioned the agreement, the dissentients might file a bill on behalf of themselves and the other shareholders, against the company and its directors, to have it declared void. [*Beman v. Rufford*] . 550

3. H. and Y. and several other persons calling themselves The Lancashire and North Yorkshire Railway Company, introduced a Bill into

Parliament for incorporating the Company and making their railway, which was intended to pass through the Plaintiff's estate, and near his residence. The Plaintiff prepared to oppose the Bill, but afterwards desisted, in consequence of H. and Y. having agreed with him, on behalf of the company, that, in case the company should, in the then or any subsequent session, obtain, an Act of incorporation, they would pay the Plaintiff 1000*l.* for all lands required by them for making the railway, and 4000*l.* for residential injury, and 25*l.* for his personal expenses, and also that they would pay the expenses of his solicitor in the business. Afterwards that company agreed to join with a rival company, calling itself The Liverpool, Manchester and Newcastle Company, in applying for an Act for making a railway the line of which, so far as the Plaintiff's estate was concerned, was the same as the line of the Lancashire and North Yorkshire Company; and the two companies agreed to adopt the agreement with the Plaintiff. The Act passed, and by it the two companies were incorporated by the name of The Liverpool, Manchester and Newcastle Railway Company. Held that the incorporated company must be taken to be the parties on whose behalf H. and Y. entered into the agreement with the Plaintiff. The Court also was of opinion that the true construction of the agreement was that, as the Plaintiff had withdrawn his opposition to the Bill in Parliament, the company were bound to pay the sums agreed to be paid to him, although they had not taken possession of any part of his estate. But, the question as to the construction of the agreement being a

legal one, a case was directed for the opinion of a Court of Law. [*Preston v. Liverpool, Manchester and Newcastle-upon-Tyne Junction Railway Company*] . . . 586

See SECRETARY'S SALARY.

AMENDMENT.

See DEMURRER.

ANSWER.

1. A bill impeached a deed on the ground of fraud, and interrogated the Defendant as to the contents of certain letters which had passed between her and her solicitor, and which, it stated, showed that the deed was prepared and executed for the alleged fraudulent purpose. The Defendant, in her answer, declined to set forth the contents of the letters, as being privileged communications. The Court held that the transaction, according to the account of it given in the bill and answer, was not a fraud; and, therefore, that the Defendant was not bound to set forth the contents of the letters. Communications between a solicitor and his client relative to a fraud contrived between them, are not *exceptions* to the general rule; they do not fall within the rule itself: for the rule applies, not to all that passes between a solicitor and his client, but only to what passes between them in professional confidence; and no Court can permit it to be said that the contriving of a fraud forms part of the professional occupation of an attorney or solicitor. [*Follett v. Jefferyes*] . . . 3
2. A Defendant admitted that he had, in his possession, documents relating to the matters mentioned in the bill; but refused to set forth a list of them, because they had

been procured by his solicitor, since the institution of the suit, and for the purpose of his defence to it; and the same were, *as he was advised and insisted*, confidential communications. Held that the allegation relative to the documents did not justify the Defendant's refusal to set forth a list of them; and, therefore, that his answer was insufficient. [*Balguy v. Broadhurst*] 111

ASSETS.

The equity of redemption of a mortgage in fee, is made legal assets by 3 & 4 Will. IV. c. 104. [*Foster v. Handley*] 200

BENEFICED CLERGYMAN.

See DEBTOR AND CREDITOR, 1.

CALL.

See CONTRIBUTORY, 8, 9.

CERTIFICATE.

The Master certified that he had included A.'s name in the list of contributories, not as a shareholder, but as a contributory *in respect of any expenditure which he might be proved to have incurred*. The Court held the certificate to be informal, and directed the Master to review his certificate, with liberty, to either party, to adduce further evidence. [*Riddell's case*] 402

CLAIM.

1. Some of the residuary legatees under a will, may file a claim against the executors, without making the other residuary legatees parties; but the others ought to be summoned before the Master. [*Watson v. Young*] 114
2. Motion for an order under the 31st General Order of May 1845,

against a Defendant to a claim, who had absconded, refused. [*Smith v. Corles*] 259

CLERGYMAN.

See DEBTOR AND CREDITOR, 1.

CONDITION.

1. Testator gave a legacy in trust for his daughter for life, remainder in trust for her children who should attain twenty-one, remainder in trust for two of his sons absolutely: and he gave the residue of his personal estate to his other children. By a codicil, he declared that, finding that his daughter intended to become a nun, he revoked the bequest, in the event of her carrying her intention into effect, and excluded her from all reversionary advantages from his will. The daughter became a nun. Held that the condition annexed by the codicil, was a lawful one; and that, though the bequest in favour of the daughter was merely revoked, and there was no gift over on breach of the condition, the daughter's interest under the bequest in the will, ceased on her becoming a nun. [*Dickson, ex parte*] 37
2. John William Earl of Bridgewater devised his freehold estates to trustees, in trust to convey them to the use of Lord Alford, his great nephew, for ninety-nine years if he should so long live; remainder to trustees and their heirs during the life of Lord Alford, in trust to preserve contingent remainders: remainder to the use of the heirs male of the body of Lord Alford, with divers remainders over: provided that, if Lord Alford should die not having acquired the title of Duke or Marquis of Bridgewater, *the estate directed to be limited to*

the heirs male of his body, should cease, and the estates should, thereupon, go over and be enjoyed according to the subsequent uses and limitations directed by his will. Lord Alford died leaving a son, but without having acquired the title. Held that the proviso was valid. [*Egerton v. Lord Brownlow*] 464

CONFIDENTIAL COMMUNICATIONS.

See PRIVILEGED COMMUNICATIONS.

CONSTRUCTION.

1. Testator bequeathed Greenacre to Catherine S. for life, with remainder to her son, John S. in fee; provided that if he should die in his mother's lifetime, then and in such case, the testator gave Greenacre, together with all the residue of his real and personal estate, to trustees, in trust for Isabella A. for life, remainder in trust, as to one-fourth, for such persons as she should appoint by will; and upon further trust, to divide, convey, assign and transfer all the rest, residue and remainder of the trust property, unto and to the use of Maria C., Rose B., and John S. absolutely. John S. survived his mother, and Isabella A. died intestate. Held that the trustees took the residuary real estate on the testator's death; and that Maria C., Rose B., and John S. were not entitled to the one-fourth of the property, which was subjected to Isabella A.'s appointment, but that it was undisposed of. [*Simmons v. Rudall*] 115
2. Testator bequeathed the residue of his personal estate to trustees, in trust for his wife, during her widowhood, and, after her death or second marriage, in trust to be divided, share and share alike, among his five sisters *and their respective*

families, if any. Held that each sister *and her children living at the testator's death*, were entitled, in remainder expectant on the death or second marriage of the widow, to one-fifth of the residue, as joint-tenants. [*Parkinson's Trust*] 242

3. Testator directed the dividends of his residue to be paid to his three children A. B. and C. in certain shares, and that, after the decease of any one or two of them until the decease of the survivor, the shares of the deceased parents, should go to their respective children; and that, after the decease of his surviving child, the capital of the residue should be divided amongst the children of his said children, *per capita*. A. died first, B. next, and C. last. Both A. and C. left children, some of whom were living at C.'s death. B. had children, but they all died in her lifetime. Held, nevertheless, that they took vested, transmissible interests in the dividends of B.'s share of the residue, which accrued between B.'s and C.'s deaths. [*Homer v. Gould*] 541
4. Testator gave 4000*l.* to his granddaughter, and directed his executors to pay it to her on her attaining twenty-one, and to apply the interest of it for her maintenance, during her minority. By a codicil, he directed that his granddaughter should have only the interest of 2000*l.* for her maintenance, until she attained twenty-three, and that the interest of the other 2000*l.* should be accumulated, and that, on her attaining twenty-three, his executors should have the whole settled upon her, for her life, and, after her death, to her child or children, in equal proportions so that no husband of hers might spend it. The granddaughter attained twen-

ty-three, and died without having had a child and without the executors having made any settlement of the legacy. Held that the gift in the will, was an absolute gift, and that, in the events that had happened, it was not affected by the codicil. [*Bell v. Jackson*] . 547

See AGREEMENT, 3.—LEGACY, 2.—
PARENT AND CHILD.—POWER, 1.
—RESTRAINT ON ANTICIPATION.
—SECRETARY'S SALARY.—TRUST.
—WILL, 1. 3.

CONTRIBUTORY.

1. After the registrar of joint-stock companies had granted a certificate of the complete registration of a company, an order was made for winding up its affairs. The Master excluded the name of a shareholder from the list of contributories, because the deed of settlement had not been executed by the number of covenanting shareholders required by the Joint-stock Companies Registration Act. But the Court ordered his name to be restored. [*Bird's case*] . . . 47
2. A. applied, by letter, to the committee of a provisionally registered railway company, for fifty shares in the undertaking, and, thereby, undertook to accept them or any less number that might be allotted to him, and to pay the deposits thereon, and to sign the parliamentary contract and subscriber's agreement when required. The committee allotted him thirty shares; but he did not pay the deposits thereon or do any other act in pursuance of his undertaking. The project proved abortive; and the affairs of the company were ordered to be wound up. Held that A. was not liable, as a contributory, even to the ex-

tent of the deposits. [*Capper's case*] 178

3. Motion that the name of a contributory might be struck off the list, refused with costs: the case being undistinguishable, in principle, from *Uppill's case*. That case observed upon. [*Ex parte Sichell*] . 187

4. After the Master had inserted B.'s name in the list of contributories, and after the Court, on appeal, had ordered it to be struck off, the Master, on new evidence being brought before him, ordered the name to be replaced on the list. The Court held that the Master had exceeded his jurisdiction, and ordered the name to be again struck off. [*Best's case*] 193

5. B. consented to his name being placed on the list of the provisional committee of a company, as an *ornamental member*, and to take such number of shares in the company as might be allotted to him. Afterwards the managing committee allotted him twenty-five shares. The letter of allotment stated that, on payment of the deposits, the receipts must be exchanged for a certificate of scrip, which would be granted on the due execution of the subscriber's agreement and parliamentary contract, *without which no person would be recognised as a subscriber, or be entitled to any interest in the undertaking*. Those instruments were never engrossed; and consequently, A. never executed them. He, however, paid the deposits on the twenty-five shares, but not until after the undertaking had been abandoned. The Master struck A.'s name off the list of contributories; but the Court ordered it to be restored. [*Brittain's case*] 281

6. The managing director of a com-

- pany having had 150 shares awarded to him by the provisional directors, in consideration of his services, and being the covenantee in the deed of settlement, his brother, at his request, executed the deed as the holder of the shares; and several other shareholders executed it after him. Afterwards the directors rescinded the resolution by which they had awarded the shares, and the managing director delivered up the certificates for the shares, to them. The Master excluded the brother's name from the list of contributories; but the Court ordered it to be restored. [*Holt's case*] 389
7. The secretary to a company wrote to A., a member of the provisional committee, informing him that the managing committee had apportioned one hundred shares to each member of the provisional committee, and requesting to be informed on or before a certain day, whether A. would take that or any less number of shares, otherwise the committee would consider that he declined taking any. A., in answer, requested that the one hundred shares might *be reserved for him*. The Court directed an issue to try whether A. had accepted the shares. [*Onions's case*] 394
8. The Master ought not to make a call on any contributory, until he has ascertained that the contributory is liable to pay the debt or debts in respect of which the call is made. [*Upfill's case*] 395
9. No order ought to be made for a call upon the contributories of a provisionally registered company, on account of the costs of winding up the company, until the liabilities of the contributories have been ascertained or at least, till the Master has ascertained the liability of the contributories to the costs in respect of which the call is made. The contributories of a provisionally registered company, are not liable, *in proportion to the number of their shares*, to the costs of winding up the company: *semble*. [*Hunter's case*] 435
10. The rights and liabilities of the persons concerned in an attempt to form a joint-stock company which fails, are not affected by the Registration or the Winding-up Acts. Carrick had been a member of the provisional and of the executive committee of a provisionally registered company, and a party to resolutions for the appointment of a surveyor &c. and had consented to take a share or shares; and a letter of allotment of a certain number was sent to him. He had also contributed to a fund raised, *after the abandonment of the undertaking*, for defraying the expenses incurred by the company. On these grounds, the Master placed his name on the list of contributories. But, as there was no distinct evidence of his acceptance of shares, or that expense had been incurred in consequence of the resolutions, or, if any expense had been incurred, that it remained unliquidated or had been liquidated by those who were entitled to call upon him for contribution, the Court ordered his name to be struck off the list, but gave the official manager liberty to apply to the Master to restore it, if he could show that the debts remaining to be discharged, were debts for which Carrick was liable. [*Carrick's case*] 505
11. A. had been a member of the provisional committee and had accepted shares in a company which was

ordered to be wound up. The Master placed A.'s name on the list, as a contributory to the expenses of the committee incurred between the 14th of October 1845, the day on which he accepted his shares, and the 30th of November 1845, on or before which day they ought to have deposited their plans &c., in order to obtain an Act of incorporation in the then next session; but they did not do so, nor did they, after that day, take any steps towards the establishment of the Company. Held that A. was liable to contribute to the expenses incurred between the 14th of October and 30th November 1845 both inclusive, but was not liable to contribute to the expenses incurred before the former day or after the latter. [*Bright's case*] . . . 602

See JOINT-STOCK COMPANIES
WINDING-UP ACTS, 2, 14.

CONVERSION.

See REINVESTMENT OF COMPEN-
SATION MONEY.

COPYRIGHT.

Under the Act to amend the law of copyright, 5 & 6 Vict. c. 45, actual payment for an article written for a periodical work, is a condition precedent to the vesting of the copyright, in the article, in the proprietor of the work; a contract for payment is not sufficient. [*Richardson v. Gilbert*] . . . 336

CORPORATION.

An incorporated company demurred to a bill, because the discovery thereby sought might subject it to criminal prosecution under the 59

Geo. III. c. 69 (to prevent the enlisting of his Majesty's subjects for foreign service, and the fitting out, in his Majesty's dominions, vessels for warlike purposes without his licence). The Court held that a corporation was not liable to be indicted under the Act, and overruled the demurrer. [*King of the Two Sicilies v. Willcox*] . . . 334

See AGREEMENT, 3.

COSTS.

1. A petition praying either that a company might be wound up, or that a preliminary inquiry might be directed as to the expediency of winding it up, was dismissed, as having been presented without sufficient ground; and the Petitioner was ordered to pay the Respondent's costs, although the Respondent was not liable as a contributory, nor had been served with the petition, but appeared voluntarily. [*James, ex parte*] 140
2. The demurrer on the record having been allowed, and a demurrer *ore tenus*, for want of parties, having been overruled, the Court ordered the Defendants to pay the costs of the former, but made no order as to the costs of the latter; and gave the Plaintiff leave to amend either by adding parties, or striking out the passages which made the new parties necessary. [*Macintyre v. Connell*] . . . 257

See CONTRIBUTORY, 9.

COVENANT.

The owner of an estate covered it with houses, and sold some of them subject to a covenant not to carry on any trade, *business or calling*, therein, or to otherwise use or suf-

fer the same to be used, to the annoyance, nuisance or injury of any of houses on the estate. Held that the carrying on of a girls' school in one of the houses, was a breach of the covenant; and that the covenantee had not waived the benefit of the covenant, though he had permitted other houses held under the like covenant, to be used as schools. [*Kemp v. Sober*] 517

CREDITOR.

The registered secretary to a provisionally registered company, in pursuance of instructions given to him at a meeting of the members or committee of the company, gave orders to an advertising agent to cause the scheme, &c. of the company to be advertised. The agent executed the orders, and paid for the advertisements; and afterwards claimed, before the Master charged with the winding-up of the company, to be admitted a creditor of the company for the amount paid by him; but he did not know the names of the persons present at the meeting. The Master declined to admit the claim as a proof, because the affidavits in support of it, did not establish a debt against any particular persons or against the whole class of contributories: and the Court, on appeal, confirmed the Master's decision. [*Ex parte Lloyd*] 248

See DEBTOR AND CREDITOR.

CREDITOR'S SUIT.

A suit was instituted by A. on behalf of himself and all the other creditors of a testator, against the executor. The executor disputed the Plaintiff's debt, but admitted that he had paid all the testator's debts which had come to his know-

ledge, and also the legacies given by the will, and that he was the residuary legatee. The Plaintiff proved the debt; and, after the hearing of the cause, contended that the decree ought to be prefaced with a declaration that he was a creditor on the testator's estate for the amount of his debt. But the Court held that, notwithstanding the special circumstances of the case, the declaration ought not to be made, and that the Plaintiff was bound to prove his debt over again in the Master's office. [*Field v. Titmuss*] 218

DEBT (PROOF OF).

See CREDITOR'S SUIT.

DEBTOR AND CREDITOR.

1. A judgment entered up, in 1845, against a beneficed clergyman, for a debt, was duly registered. Held that, under the 1 & 2 Vict. c. 110, s. 13, it was a charge upon his benefice, and that the creditor was entitled to have a receiver of the profits of the benefice appointed. [*Hawkins v. Gathercole*] . . . 63
2. A. conveyed all his property to three of his creditors, in trust to pay the debts due, from him, to themselves and to his other creditors who should execute the deed. The trustees and some of the other creditors, executed the deed but with notice that B. had a demand upon A. and was about to enforce it. Afterwards B. filed a bill, against A. and the trustees, to set aside the deed, on the ground that it was a mere voluntary deed of agency. The Court, at the hearing, dismissed the bill, with costs. [*Mackinnon v. Stewart*] . . . 76

See ASSETS.—CREDITOR.—PARTIES AND PLEADING, 3.

DECREE IN A CREDITOR'S SUIT.

A suit was instituted by A. on behalf of himself and all the other creditors of a testator, against the executor. The executor *disputed the Plaintiff's debt, but admitted that he had paid all the testator's debts which had come to his knowledge, and also the legacies given by the will, and that he was the residuary legatee.* The Plaintiff proved the debt; and, after the hearing of the cause, contended that the decree ought to be prefaced with a declaration that he was a creditor on the testator's estate for the amount of his debt. But the Court held that, notwithstanding the special circumstances of the case, the declaration ought not to be made, and that the Plaintiff was bound to prove his debt over again in the Master's office. [*Field v. Titmuss*]
218

DEFENDANT.

1. A defendant, a foreigner, sojourning in this country, declined to produce documents, because they would expose him to criminal prosecution in his own country; but the Court made the order. [*King of the Two Sicilies v. Willcox*] 301
2. A defendant, or witness, if interrogated as to matters tending to criminate him, may decline to answer at any time, notwithstanding what he has disclosed, may be sufficient to convict him. The decision in *Ewin v. Osbaldiston*, 6 Sim. 608, disapproved of. [*King of the Two Sicilies v. Willcox*] 301

See ANSWER, 2.—INTERPLEADING SUIT.—PRINCIPAL AND AGENT.

DEMURRER.

The demurrer on the record having

been allowed, and a demurrer *ore tenus*, for want of parties, having been overruled, the Court ordered the Defendants to pay the costs of the former, but made no order as to the costs of the latter; and gave the Plaintiff leave to amend either by adding parties, or striking out the passages which made the new parties necessary. [*Macintyre v. Connell*] 257

See CORPORATION.—PARTIES AND PLEADING, 3.

DEVISE.

See ERASURES, &c.

DISCOVERY.

See CORPORATION.—PARTIES AND PLEADING, 3.—PRINCIPAL AND AGENT, 1.—PRODUCTION OF DOCUMENTS, 1, 2, 3, 4.

EARMARK.

See FOREIGN SOVEREIGN.

EQUITY OF REDEMPTION.

The equity of redemption of a mortgage in fee, is made legal assets by 3 & 4 Will. IV. c. 104. [*Foster v. Handley*] 200

See MORTGAGOR AND MORTGAGEE, 1.—PARTIES AND PLEADING, 1.

ERASURES AND INTERLINEATIONS IN A WILL.

A testator who died in 1821, struck the name of one of the *devisees* out of his will, and interlined the names of two other persons above the erasure; but those alterations were not noticed in the attestation clause, nor was there anything to show, or from which it could be inferred that they were made before the will was executed. Held that they did not affect the devise. [*Simmons v. Rudall*] 115

FACTOR.

The plaintiff, a merchant in India, consigned goods to A. of Liverpool, to sell on his account, and drew bills against the goods, which A. accepted. A. then placed the goods in the hands of B. his correspondent in London, with instructions to sell them or cause them to be sold, and drew a bill upon B. for 1680*l.*, which B. accepted on the security of the goods, *but with notice that the Plaintiff had consigned the goods to A. for sale on his account.* A. became insolvent, leaving the bills drawn by the Plaintiff, unpaid. B. paid the bill for 1680*l.*, and then sold the goods for 1300*l.* A bill filed by the Plaintiff, against A. and B. for an account and payment, by B., of the proceeds of the goods, was dismissed with costs. A bill for an account by a principal against his agent, is not sustainable where the transaction to which it relates, is a single transaction, not tainted with fraud, and the Plaintiff has a remedy at law. [*Navulshaw v. Brownrigg*] . 573

FAMILY.

See POWER, 1.—WILL, 4.

FEME COVERTE.

See MARRIED WOMAN.

FORECLOSURE.

The time fixed, by the decree in a foreclosure suit, for payment of principal, interest and costs, enlarged by the Vice-Chancellor, notwithstanding the decree had been made absolute, and the order absolute had been signed and enrolled. [*Thornhill v. Manning*]

451

FOREIGN SOVEREIGN.

The government formed during a revolution in Sicily, seized upon the king's treasure, and remitted part of it to persons in this country, to purchase steam-ships; and they applied the remittance accordingly. Held that the King, who had re-established his authority, was entitled to sue for one of the ships, which remained in the port of London, and that the persons who made the remittance were not necessary parties to the suit. [*King of the Two Sicilies v. Willcox*] 332

FRAUD.

See INSUFFICIENCY, 1.

HEIR.

A testator died in 1821, having devised and bequeathed his real and personal estate to trustees upon certain trusts. In 1826 a bill was filed for the execution of the trusts as to the *personal* estate. In 1847 a supplemental bill was filed raising questions on the will, as to the *real* estate, in which the heir, who was then unknown, was interested: and, in 1849, another supplemental bill was filed to bring the heir, who was then ascertained, before the Court. Held that the heir was barred, by lapse of time, from claiming the real estate adversely to the trustees; but that he was not barred from claiming part of the real estate as being, in the events that had happened, undisposed of and held, by the trustees, in trust for him. [*Simmons v. Rudall*] 115

HUSBAND AND WIFE.

A. being desirous to sell an estate on which his wife's jointure was secured, she and her trustees, re-

leased the estate from her jointure, and he covenanted to secure it on such estates as he might thereafter acquire. He, afterwards, purchased another estate, but declined to perform his covenant. Whereupon she filed a bill to compel him to perform it, charging that she entered into the aforesaid arrangement, *under the advice of her husband's solicitor and counsel and without having any other legal advice*, and charging also that the solicitor, who was made a co-defendant, had, in his possession, cases for the opinion of counsel and the opinions thereon and other documents relating to the matters mentioned in the bill. The husband and his solicitor admitted these charges, but added that the cases and opinions came into and were in the solicitor's possession, *as the husband's solicitor*; and the husband said that the cases were laid before counsel, *on his behalf and by his direction and not on behalf or by the direction of any other person*. A motion, on the wife's behalf, for the production of the cases and opinions and of certain letters which had passed between the husband and his solicitor, and which he alleged to be confidential communications, was refused. [*Warde v. Warde*] 18

See MARRIED WOMAN.

INJUNCTION.

1. After a railway company had purchased a piece of land from A., who was mentioned in the book of reference to be the owner of it, B., a neighbouring land-owner, part of whose land the company had also taken, claimed to be owner of the piece of land, and filed a bill for an

injunction to restrain the company from continuing in possession of it, and from committing waste on it. But the Court refused the injunction. [*Webster v. The South-Eastern Railway Company*] . . . 272

2. Held, notwithstanding the decision in *The London and North Western Railway Company v. Smith*, that a person who has served a railway company with notice, under the 68th section of the Lands Clauses Act, claiming compensation on the ground that his land has been injuriously affected by the execution of the company's works, ought not to be restrained from proceeding pursuant to his notice. [*South Staffordshire Railway Company v. Hall*] 373
3. Injunction to restrain the Defendants from entering into an agreement with another railway company, which would be a violation of or inconsistent with a subsisting agreement between the Plaintiffs and the Defendants, refused; the inconvenience to arise from granting the injunction, being greater than the inconvenience to arise from refusing it. In what cases the Court will interfere, to preserve property in litigation, *in statu quo*. [*Shrewsbury and Chester v. Shrewsbury and Birmingham Railway Company*] 410

INSUFFICIENCY.

1. A bill impeached a deed on the ground of fraud, and interrogated the Defendant as to the contents of certain letters which had passed between her and her solicitor, and which, it stated, showed that the deed was prepared and executed for the alleged fraudulent purpose. The Defendant, in her answer, de-

- clined to set forth the contents of the letters, as being privileged communications. The Court held that the transaction, according to the account of it given in the bill and answers, was not a fraud; and, therefore, that the Defendant was not bound to set forth the contents of the letters. Communications between a solicitor and his client relative to a fraud contrived between them, are not *exceptions* to the general rule; they do not fall within the rule itself: for the rule applies, not to all that passes between a solicitor and his client, but only to what passes between them in professional confidence; and no Court can permit it to be said that the contriving of a fraud forms part of the professional occupation of an attorney or solicitor. [*Follett v. Jefferyes*] 3
2. A Defendant admitted that he had, in his possession, documents relating to the matters in the bill; but refused to set forth a list of them, because they had been procured by his solicitor, since the institution of the suit, and for the purpose of his defence to it; and the same were, *as he was advised and insisted*, confidential communications. Held that the allegations relative to the documents did not justify the Defendant's refusal to set forth a list of them; and, therefore, that his answer was insufficient. [*Balguy v. Broadhurst*] 111

INTEREST.

Testator gave the produce of his share and interest in his co-partnership business, to his wife, and also *the interest* of the capital sum of 1000*l.* for her sole use and benefit and free from the debts or control

of any husband she might marry, and her receipt to be a sufficient discharge to his executors; and he gave all his furniture, plate, &c., to her *absolutely*. Held that the gift of the interest of the 1000*l.* passed the principal. [*Humphrey v. Humphrey*] 536

INTERIM INTERFERENCE.

See AGREEMENT, 1.

INTERPLEADING SUIT.

A Defendant *to an interpleading suit*, may, after decree, file a supplemental bill to bring a new party before the Court, without making the other parties to the original suit, parties to it. [*Lyne v. Pennell*] 113

INTESTACY.

See CONSTRUCTION, 1.

JOINT-STOCK COMPANIES WINDING-UP ACTS.

1. After the registrar of joint-stock companies, had granted a certificate of the complete registration of a company, an order was made for winding up its affairs. The Master excluded the name of a shareholder from the list of contributories, because the deed of settlement had not been executed by the number of covenanting shareholders required by the Joint-stock Companies Registration Act. But the Court ordered his name to be restored. [*Bird's case*] 47
2. A., who had been appointed secretary to a joint-stock company at a yearly salary to commence on the 25th of March 1848, signed an agreement that no director or shareholder of the company should be personally responsible for the sa-

- laries of any of the officers ; and that no officer should be paid for his services, until a sufficient sum should be obtained, *by the funds of the company*, for that purpose. An order for winding up the company was made on the 23rd of Feb. 1850. Held that the agreement did not exonerate the shareholders from liability to contribute, *as members of the company*, to the payment of arrears of salary due to the secretary ; and that though he was not, in strictness, entitled to more than a portion of his salary for the second year, yet, as he had served for nearly the whole of that year, it was but reasonable to allow him his salary for the whole of it. [*Cope's case*] . . . 54
3. A provisionally registered railway company having abandoned their undertaking, the directors made two payments to the shareholders in part return of their deposits ; and they offered to make a third *and final* payment, which the whole or nearly the whole of the shareholders, except A., accepted. All the debts and liabilities of the company were discharged, and all the assets of it were exhausted ; and A. applied for and received the second payment, as being one of the shareholders who had concurred in the dissolution of the company. Nevertheless he, being dissatisfied as he alleged, with the directors' accounts, petitioned for an order for the dissolution and winding-up of the company, or for winding it up if it had been already dissolved. The Court refused to make the order at once, and directed the Master to inquire and state whether it was necessary or expedient that the company should be dissolved and wound up, or wound up. [*Williams's case*] 57
4. A petition praying either that a company might be wound up, or that a preliminary inquiry might be directed as to the expediency of winding it up, was dismissed, as having been presented without sufficient ground ; and the Petitioner was ordered to pay the Respondent's costs, although the Respondent was not liable as a contributory, nor had been served with the petition, but appeared voluntarily. [*James's case*] 140
5. A loan society held to be within the Winding-up Act, 1849. [*Ex parte Smith*] 165
6. A. applied, by letter, to the committee of a provisionally registered railway company, for fifty shares in the undertaking, and, thereby, undertook to accept them or any less number that might be allotted to him, and to pay the deposits thereon, and to sign the parliamentary contract and subscribers' agreement when required. The committee allotted him thirty shares ; but he did not pay the deposits thereon or do any other act in pursuance of his undertaking. The project proved abortive ; and the affairs of the company were ordered to be wound up. Held that A. was not liable, as a contributory, even to the extent of the deposits. [*Capper's case*] 178
7. Motion that the name of a contributory might be struck off the list, refused with costs : the case being undistinguishable, in principle, from *Upfill's case*. That case observed upon. [*Sichell's case*] 187
8. After the Master had inserted B.'s name in the list of contributories, and after the Court, on ap-

peal, had ordered it to be struck off, the Master, on new evidence being brought before him, ordered the name to be replaced on the list. The Court held that the Master had exceeded his jurisdiction, and ordered the name to be again struck off. [*Best's case*] . . . 193

9. The registered secretary to a provisionally registered company, in pursuance of instructions given to him at a meeting of the members or committee of the company, gave orders to an advertising agent to cause the scheme, &c. of the company to be advertised. The agent executed the orders, and paid for the advertisements; and afterwards claimed, before the Master charged with the winding-up of the company, to be admitted a creditor of the company for the amount paid by him; but he did not know the names of the persons present at the meeting. The Master declined to admit the claim as a proof, because the affidavits in support of it, did not establish a debt against any particular persons or against the whole class of contributories; and the Court, on appeal, confirmed the Master's decision. [*Lloyd's case*] . . . 248

10. A. consented to his name being placed on the list of the provisional committee of a company, *as an ornamental member*, and to take such number of shares in the company as might be allotted to him. Afterwards the managing committee allotted him twenty-five shares. The letter of allotment stated that, on payment of the deposits, the receipts must be exchanged for a certificate of scrip, which would be granted on the due execution of the subscribers' agreement and par-

liamentary contract, *without which no person would be recognised as a subscriber, or be entitled to any interest in the undertaking*. Those instruments were never engrossed; and, consequently, A. never executed them. He, however, paid the deposits on the twenty-five shares, but not until after the undertaking had been abandoned. The Master struck A.'s name off the list of contributories; but the Court ordered it to be restored. [*Brittain's case*] . . . 281

11. The managing director of a company having had 150 shares awarded to him by the provisional directors, in consideration of his services, and being the covenantee in the deed of settlement, his brother, at his request, executed the deed as the holder of the shares; and several other shareholders executed it after him. Afterwards the directors rescinded the resolution by which they had awarded the shares, and the managing director delivered up the certificates for the shares, to them. The Master excluded the brother's name from the list of contributories; but the Court ordered it to be restored. [*Holt's case*] . . . 389

12. The secretary to a company wrote to A., a member of the provisional committee, informing him that the managing committee had apportioned one hundred shares to each member of the provisional committee, and requesting to be informed, on or before a certain day, whether A. would take that or any less number of shares, otherwise, the committee would consider that he declined taking any. A., in answer, requested that one hundred shares might *be reserved for him*. The

- Court directed an issue to try, whether A. had accepted the shares. [*Onions's case*] 394
13. The Master ought not to make a call on any contributory, until he has ascertained that the contributory is liable to pay the debt or debts in respect of which the call is made. [*Upfill's case*] . . . 395
14. The Master certified that he had included A.'s name in the list of contributories, not as a shareholder, but as a contributory *in respect of any expenditure which he might be proved to have incurred*. The Court held the certificate to be informal, and directed the Master to review his certificate, with liberty, to either party, to adduce further evidence [*Riddell's case*] 402
15. No order ought to be made for a call upon the contributories of a provisionally registered company, on account of the costs of winding up the company, until the liabilities of the contributories have been ascertained, or at least till the Master has ascertained the liability of the contributories to the costs in respect of which the call is made. The contributories of a provisionally registered company, are not liable, *in proportion to the number of their shares*, to the costs of winding up the company: *semble*. [*Hunter's case*] 435
16. Pending a suit by the shareholders against the directors of a joint-stock company, one of the Defendants obtained an order under the 11th and 12th Vict. c. 45, for winding up the affairs of the company. Some time afterwards *the Plaintiffs* moved that all further proceedings in the suit, might be stayed, until the affairs of the company had been wound up under the order. The Court refused the motion with costs. [*Deeks v. Stanhope*] 439
17. The rights and liabilities of the persons concerned in an attempt to form a joint-stock company which fails, are not affected by the Registration or the Winding-up Acts. Carrick had been a member of the provisional and of the executive committee of a provisionally registered company, and a party to resolutions for the appointment of a surveyor, &c., and had consented to take a share or shares; and a letter of allotment of a certain number was sent to him. He had also contributed to a fund raised, *after the abandonment of the undertaking*, for defraying the expenses incurred by the company. On these grounds, the Master placed his name on the list of contributories. But, as there was no distinct evidence of his acceptance of shares, or that expense had been incurred in consequence of the resolutions, or, if any expense had been incurred, that it remained unliquidated or had been liquidated by those who were entitled to call upon him for contribution, the Court ordered his name to be struck off the list, but gave the official manager liberty to apply to the Master to restore it, if he could show that the debts remaining to be discharged, were debts for which Carrick was liable. [*Carrick's case*] 505
18. A. had been a member of the provisional committee and had accepted shares in a company which was ordered to be wound up. The Master placed A.'s name on the list, as a contributory to the expenses of the committee incurred between the 14th October, 1845,

- the day on which he accepted his shares, and the 30th of November, 1845, on or before which day they ought to have deposited their plans, &c., in order to obtain an Act of incorporation in the then next session; but they did not do so, nor did they, after that day, take any steps towards the establishment of the company. Held that A. was liable to contribute to the expenses incurred between the 14th of October and 30th November, 1845, both inclusive, but was not liable to contribute to the expenses incurred before the former day or after the latter. [*Bright's case*] 602
19. Winding-up order refused, on the ground (amongst others), that a suit was pending for the same purpose [*Phillipps, Ex-parte*] 605

JUDGMENT DEBT.

- A judgment entered up in 1845, against a beneficed clergyman, for a debt, was duly registered. Held that, under the 1 & 2 Vict. c. 110, s. 13, it was a charge upon his benefice, and that the creditor was entitled to have a receiver of the profits of the benefice appointed. [*Hawkins v. Gathercole*] . . . 63

JUDGMENT CREDITOR.

See JUDGMENT DEBT.—PARTIES AND PLEADING, 1.

JURISDICTION OF MASTER.

See JOINT-STOCK COMPANIES WINDING-UP ACTS, 8.

JURISDICTION OF VICE-CHANCELLOR.

See MORTGAGOR AND MORTGAGEE, 4.

LANDS CLAUSES ACT.

1. Held, notwithstanding the decision in *The London and North Western Railway Company v. Smith*, that a person who has served a railway company with notice, under the 68th section of the Lands Clauses Act, claiming compensation on the ground that his land has been injuriously affected by the execution of the company's works, ought not to be restrained from proceeding pursuant to his notice. [*South Staffordshire Railway Company v. Hall*] 373
2. Money paid into Court by the Liverpool Dock Trustees, in respect of leaseholds for years, taken by them under the powers of their Act of Parliament, ordered to be reinvested in the purchase of copyholds of inheritance. [*Liverpool Dock Acts, in re*] 202
3. Money paid into Court by a railway company, for land taken under the Lands Clauses Act, from a person who was in a state of mental imbecility, and who continued in that state until his death, but was not the subject of a commission of lunacy, ordered, after his death, not to be reinvested in or considered as land, but to be paid to his executors. [*Flamank, ex parte*] 260

LEGACY.

1. Testator gave a legacy in trust for his daughter for life, remainder in trust for her children who should attain twenty-one, remainder in trust for two of his sons absolutely; and he gave the residue of his personal estate to his other children. By a codicil, he declared that, finding that his daughter intended to become a nun, he revoked the

bequest in the event of her carrying her intention into effect, and excluded her from all reversionary advantages from his will. The daughter became a nun. Held that the condition annexed, by the codicil, was a lawful one; and that, though the bequest in favour of the daughter was merely revoked, and there was no gift over on breach of the condition, the daughter's interest under the bequest in the will, ceased on her becoming a nun. [*Dickson's case*] . . . 37

2. Testator gave the produce of his share and interest in his co-partnership business, to his wife, and also the interest of the capital sum of 1000*l.* for her sole use and benefit and free from the debts or control of any husband she might marry, and her receipt to be a sufficient discharge to his executors; and he gave all his furniture, plate, &c., to her *absolutely*. Held that the gift of the interest of the 1000*l.* passed the principal. [*Humphrey v. Humphrey*] 536

LIVERPOOL DOCK ACTS.

Money paid into Court by the Liverpool Dock Trustees, in respect of leaseholds for years, taken by them under the powers of their Act of Parliament, ordered to be re-invested in the purchase of copyholds of inheritance. [*Liverpool Dock Acts, in re*] 202

LOAN SOCIETY.

A loan society held to be within the Winding-up Act, 1849. [*Smith's case*] 165

MARRIED WOMAN.

1. The dividends of stock standing in the Accountant-General's name, to

which a woman was entitled for life at the time of her marriage, were ordered to be paid to her husband during her life or until further order. Some time afterwards, the husband deserted his wife, and became bankrupt, having previously possessed himself of 2000*l.*, to which she was absolutely entitled. The Court ordered two thirds of the dividends to be paid to the wife, and the other third to the husband's assignees. [*Vaughan v. Buck*] 284

2. Security for costs ordered to be given in a suit in which a married woman was Plaintiff by her next friend, the next friend being a labourer. [*Stevens v. Williams*] 545

See RESTRAINT ON ANTICIPATION.

MASTER.

See JURISDICTION OF MASTER.

MORTGAGOR AND MORTGAGEE.

1. A. mortgaged his freehold and copyhold estates and some drainage bonds, and, by the same deed, his daughters mortgaged their freehold and copyhold estates, to B. to secure 6000*l.* lent by B. to A., and the deed declared that, without prejudice to any of the rights or remedies of B., his heirs, executors, &c., as between A., his heirs, executors, &c., on the one hand, and the daughters, and their heirs, executors, &c., on the other hand, A. his heirs, executors, &c., should be primarily liable to the payment of the 6000*l.*, and that his freehold and copyhold estates therein comprised should be primarily liable to answer and make good the 6000*l.* Six years afterwards, A. mortgaged his freehold and copy-

- hold estates comprised in the prior mortgage, and also the drainage bonds, to B., to secure 700*l.*, lent to him by B. Held that B. was not entitled, as against A.'s daughters, to tack his second mortgage to the first, but that the daughters were entitled to redeem the first mortgage on payment of the 6000*l.* [*Bowker v. Bull*] . 29
2. In March 1840, A., and B. a solicitor at Carmarthen, raised 2500*l.* by sale of a sum of stock of which they were trustees, with the intention of lending it on mortgage, to C. who resided at Carmarthen, but spent part of the year in London. A. enabled B. to receive the 2500*l.* for the purpose of the loan, and intrusted him with the conduct of the transaction. Accordingly B. prepared the mortgage-deed; and, on the 29th of May 1840, through his London agents and by arrangement between him and C.'s solicitor, procured C. (who knew that the money was in B.'s hands), to execute it, and to sign a receipt, on the back of it, for the 2500*l.* The agents took the deed away with them; and, shortly afterwards, procured A. to execute it, and then sent it to B. It having been arranged, between B. and C., that the mortgage-money should be paid into the Carmarthen bank, to C.'s credit, B., on the 31st of May, paid 513*l.*, and, on the 31st of October, 1050*l.*, accordingly, in part of the 2500*l.* In November, he died insolvent. Held that, as between A. and C., A. was to be treated as mortgagee for the whole 2500*l.* [*West v. Jones*] . 205
3. The trust deeds of certain Wesleyan Methodist chapels, contained powers of raising money, by mortgage, for the purposes of the trusts. Held that any of the trustees of the chapels might be mortgagees under this power, and that, if they were such mortgagees, they might exercise all the rights of mortgagees, although in opposition to the trusts. [*Attorney-General v. Hardy*] 333
4. The time fixed, by the decree in a foreclosure suit, for payment of principal, interest and costs, enlarged by the Vice-Chancellor, notwithstanding the decree had been made absolute, and the order absolute had been signed and enrolled. [*Thornhill v. Manning*] . . 451
- See PARTIES AND PLEADING, 1.
- ### NEW ORDERS.
- Motion for an order under the 31st General Order of May 1845, against a Defendant to a claim, who had absconded, refused. [*Smith v. Corles*] 259
- ### NEXT FRIEND.
- See PRACTICE, 2.
- ### NOTICE.
- See DEBTOR AND CREDITOR, 2.—
FACTOR.
- ### PARENT AND CHILD.
- Testator gave all his property to trustees, in trust to pay an annuity to his wife, and, subject to that payment, to convey, assign or transfer, all his property, unto and equally between his children, when and as they severally attained twenty-one; and, in the mean time, to pay to his wife, or otherwise apply the rents and proceeds of their respective shares for or towards their respective maintenance, education and advancement. But, in case of the decease of any of the children under twenty-one, then upon trust to con-

vey, assign or transfer the shares of such of them as should so die, *and the accumulations*, if any, unto and equally between such of them as should attain twenty-one. The testator's widow maintained and educated the children for several years, and advanced three of them, out of the income received by her from the testator's property, exclusive of her annuity; and the income being more than sufficient for those purposes, a considerable surplus remained in her hands. Held that the surplus belonged, not to the children, but to the widow. [*Browne v. Paul*] 92

PARTIES AND PLEADING.

1. A judgment creditor, whose judgment was registered pursuant both to the Registry Act for the West Riding of Yorkshire, (5 & 6 Anne, c. 81,) and the 1 & 2 Vict. c. 110, filed a bill to redeem a prior mortgage of lands in the West Riding, and to foreclose the mortgagor. The mortgagor had confessed other judgments, and the conusees had registered them pursuant to the 1 & 2 Vict. c. 110, *but not under the West Riding Act*. Held that those conusees were not necessary parties to the suit. [*Johnson v. Holdsworth*] 106
2. Some of the residuary legatees under a will, may file a claim against executors, without making the other residuary legatees parties; but the others ought to be summoned before the Master. [*Watson v. Young*] 114
3. A. filed a bill against B. and the public officer of a banking company, seeking to make certain shares which B. held in the bank, available to the payment of a debt due to

him from B. The bill alleged that though the company had a prior charge, on the shares, for a debt due to them from B. yet that debt was amply secured by the shares of other persons in the bank, and by other securities held by the company; and it prayed that *an account might be taken of what was due to the company* in respect of their charge; and that directions might be given for the satisfaction thereof out of the last-mentioned shares, and out of or by means of the other securities held by the Company, or for enabling A. to pay, to them, the amount of their charge, and, thereupon, *to have such other securities assigned to him*; and, that the securities might be marshalled, so as to give the Plaintiff the benefit of his charge. A demurrer, because the persons who had pledged their shares and given securities, to the Company, for B.'s debt, were not made parties to the bill, was allowed. A bill contained a charge with a view to discovering who certain persons, who were interested in the relief, were; but it did not allege that the Plaintiff did not know who they were; and, therefore, a demurrer because they were not made parties, was allowed. [*Macintyre v. Connell*] . . . 252

4. The government formed during a revolution in Sicily, seized upon the King's treasure, and remitted part of it to persons in this country, to purchase steam-ships; and they applied the remittance accordingly. Held that the King, who had re-established his authority, was entitled to sue for one of the ships which remained in the port of London, and that the persons who made the remittance, were not ne-

cessary parties to the suit. [*King of the Two Sicilies v. Willcox*] 332

5. A railway company constituted under an Act of Parliament, agreed with two other railway companies, that *the whole concern*, without incumbrance, when completed, should be *worked by those two companies*, who should have *perfect control and exercise all the rights* of the first-mentioned company, and who should find stock, *and work the concern for twenty-one years*. Held that the agreement was illegal, as being in violation of the Act under which the first-mentioned company was constituted; and that, though a very large majority of the shareholders present at a meeting, had sanctioned the agreement, the dissentients might file a bill on behalf of themselves and the other shareholders, against the company and its directors, to have it declared void. [*Beman v. Rufford*] . 550

See INTERPLEADING SUIT.—PRINCIPAL AND AGENT, 1.

PEERAGE.

See CONDITION, 2.

PENALTIES.

An incorporated company demurred to a bill, because the discovery thereby sought might subject it to criminal prosecution under the 59 Geo. III. c. 69 (to prevent the enlisting of his Majesty's subjects for foreign service, and the fitting out, in his Majesty's dominions, vessels for warlike purposes without his licence). The Court held that a corporation was not liable to be indicted under that Act, and overruled the demurrer. [*King of the Two Sicilies v. Willcox*] 334

See PRODUCTION OF DOCUMENTS, 4.

—WITNESS.

PERIODICAL WORK.

Under the Act to amend the law of copyright, 5 & 6 Vict. c. 45, actual payment for an article written for a periodical work is a condition precedent to the vesting of the copyright, in the article, in the proprietor of the work: a *contract* for payment is not sufficient. [*Richardson v. Gilbert*] . . . 336

PLEADING.

See PARTIES AND PLEADING.

POWER.

1. Testator, by his will, gave personal property to his wife, absolutely, for her own use and benefit. By a codicil, which was in the form of a letter to his wife, he said: "It is my wish that you should enjoy everything in my power to give, *using your judgment as to where to dispose of it amongst your children when you can no longer enjoy it yourself*: but I should be unhappy if I thought it possible that any one not of your *family*, should be the better for what, I feel confident, you will so well direct the disposal of." Held that the word, 'family,' was not confined to children, but included descendants in every degree; and that the wife was entitled to the property, absolutely, and not merely for her life with a power in the nature of a trust for her children. [*Williams v. Williams*] . . . 358
2. A power of sale in a settlement, was given to A. and B., the trustees to preserve contingent remainders, and the survivor of them and the executors and administrators of the survivor: Held that trustees appointed by the Court in the place of A. and B. could not

exercise the power. [*Newman v. Warner*] 457

PRACTICE.

1. After an answer was to be deemed sufficient, the Plaintiff filed exceptions to it, for impertinence. Held that the pendency of those exceptions did not prevent the Defendant from moving to dismiss the bill for want of prosecution. [*Stuart v. Lloyd*] 56
Reversed. See 3 Macn. & Gord. 181.
2. Security for costs ordered to be given in a suit in which a married woman was Plaintiff by her next friend, the next friend being a labourer. [*Stevens v. Williams*] 545
See CLAIM, 2.

PRECATORY TRUST.

See POWER, 1.

PRINCIPAL AND AGENT.

1. During a revolution in Sicily, the revolutionary government sent two of the Defendants, who were natives and inhabitants of Sicily, as envoys to this country, and afterwards, remitted to them monies, which had been contributed by many thousands of the inhabitants of Sicily, with directions to purchase a steamship therewith; and the Defendants applied the monies accordingly. The lawful sovereign of Sicily, after he had re-established his authority, filed a bill, claiming the ship, which still remained in the port of London. The Defendants, in their answer, admitted the possession of documents relating to the matters in the bill, but said that they held them *as the agents and on the behalf of the persons who intrusted them with the monies,*

and submitted that, *in the absence of such persons*, they ought not to be ordered to produce the documents. The Court, however, made the order, because the Plaintiff represented the contributors of the monies; and the revolutionary government being at an end, the Defendants had either ceased to be agents or trustees for any one, or had become agents or trustees for the Plaintiff. [*King of the Two Sicilies v. Willcox*] 301

2. The Plaintiff, a merchant in India, consigned goods to A. of Liverpool, to sell on his account, and drew bills against the goods which A. accepted. A. then placed the goods in the hands of B. his correspondent in London, with instructions to sell them or cause them to be sold, and drew a bill upon B., for 1680*l.* which B. accepted on the security of the goods, *but with notice that the Plaintiff had consigned the goods to A. for sale* on his account. A. became insolvent leaving the bills drawn by the Plaintiff unpaid. B. paid the bill for 1680*l.* and then sold the goods for 1300*l.* A bill filed by the Plaintiff against A. and B. for an account and payment, by B., of the proceeds of the goods, was dismissed with costs. A bill for an account by a principal against his agent, is not sustainable where the transaction to which it relates, is a single transaction, not tainted with fraud, and the Plaintiff has a remedy at law. [*Navulshaw v. Brownrigg*] . 573

PRINCIPAL AND SURETY.

- A. mortgaged his freehold and copyhold estates and some drainage bonds, and, by the same deed, his daughters mortgaged their freehold and copyhold estates, to B. to se-

cure 6000*l.* lent by B. to A., and the deed declared that, without prejudice to any of the rights or remedies of B., his heirs, executors, &c., as between A., his heirs, executors, &c., on the one hand, and the daughters, and their heirs, executors, &c., on the other hand, A., his heirs, executors, &c., should be primarily liable to the payment of the 6000*l.*, and that his freehold and copyhold estates therein comprised should be primarily liable to answer and make good the 6000*l.* Six years afterwards, A. mortgaged his freehold and copyhold estates comprised in the prior mortgage, and also the drainage bonds, to B., to secure 700*l.* lent to him by B. Held that B. was not entitled, as against A.'s daughters, to tack his second mortgage to the first, but that the daughters were entitled to redeem the first mortgage on payment of the 6000*l.* [*Bowker v. Bull*] 29

PRIVILEGED COMMUNICATIONS.

1. A. being desirous to sell an estate on which his wife's jointure was secured, she and her trustees, released the estate from her jointure, and he covenanted to secure it on such estates as he might thereafter acquire. He, afterwards, purchased another estate, but declined to perform his covenant. Whereupon she filed a bill to compel him to perform it, charging that she entered into the aforesaid arrangement, *under the advice of her husband's solicitor and counsel and without having any other legal advice*, and charging also that the solicitor, who was made a co-defendant, had, in his possession, cases for the opinion of counsel

and the opinions thereon and other documents relating to the matters mentioned in the bill. The husband and his solicitor admitted these charges, but added that the cases and opinions came into and were in the solicitor's possession, *as the husband's solicitor*; and the husband said that the cases were laid before counsel, *on his behalf and by his direction and not on behalf or by the direction of any other person*. A motion, on the wife's behalf, for the production of the cases and opinions and of certain letters which had passed between the husband and his solicitor, and which he alleged to be confidential communications was refused. [*Warde v. Warde*] 18

2. A. purchased an advowson in June 1845, and, in August following, mortgaged it to B. In 1850 B. filed a bill, against A. and the solicitor employed by him in the purchase and the mortgage, for a sale of the advowson, alleging that the mortgage was an insufficient security; and that he was induced to lend his money upon it, by misrepresentations made to him, by A. and his solicitor, as to the value of the advowson. A., in his answer, denied the alleged fraud; but admitted that he had in his possession letters which had passed, between him and his solicitor, *in reference to the purchase and the mortgage*, and added that they were confidential communications made to him by his solicitor in that character, and therefore, were privileged; but he did not state that any of them contained legal advice or opinions, or were written *post litem motam*. The Court ordered him to produce all the letters. [*Hawkins v. Gathercole*] 150

3. The answer, after denying the title of the Plaintiffs, set forth a schedule of documents in the possession of the Defendants, which it admitted related to the matters mentioned in the bill; but it denied that, by those documents, the truth of such matters would appear to be otherwise than as stated in the answer; and it submitted that the Defendants ought not to be ordered to produce the documents, and, in addition, that certain of the letters mentioned in the schedule, ought not to be produced in this or any other suit, inasmuch as they were written either pending or in contemplation of the litigation in this suit, and with reference to the matters in this suit brought into controversy, and were written to one of the Defendants from his solicitor, or from an attorney who had been employed by him in a suit instituted by him in the Lord Mayor's Court, to which the bill related, to the solicitors of that Defendant, or from one of the Defendants to another of them, for the purpose of being communicated to the solicitor of the latter, with a view to his defence in this litigation. Held that such of the letters as were written to the Defendants by their solicitors, in that character merely, were privileged, but that all the other documents and letters ought to be produced. [*Goodall v. Little*] 155

See ANSWER, 1, 2.

PRODUCTION OF DOCUMENTS.

1. A. purchased an advowson in 1845, and, in August following, mortgaged it to B. In 1850, B. filed a bill, against A. and the solicitor employed by him in the purchase

and the mortgage, for a sale of the advowson, alleging that the mortgage was an insufficient security; and that he was induced to lend his money upon it, by misrepresentations made to him, by A. and his solicitor, as to the value of the advowson. A., in his answer, denied the alleged fraud; but admitted that he had in his possession letters which had passed, between him and his solicitor, *in reference to the purchase and the mortgage*, and added that they were confidential communications made to him by his solicitor in that character, and therefore, were privileged; but he did not state that any of them contained legal advice or opinions, or were written *post litem motam*. The Court ordered him to produce all the letters. [*Hawkins v. Gathorcole*]. 150

2. The answer, after denying the title of the Plaintiffs, set forth a schedule of documents in the possession of the Defendants, which it admitted related to the matters mentioned in the bill; but it denied that, by those documents, the truth of such matters would appear to be otherwise than as stated in the answer; and it submitted that the Defendants ought not to be ordered to produce the documents, and, in addition, that certain of the letters mentioned in the schedule, ought not to be produced in this or any other suit, inasmuch as they were written either pending or in contemplation of the litigation in this suit, and, with reference to the matters in this suit brought into controversy, and were written to one of the Defendants from his solicitor, or from an attorney who had been employed by him in a suit instituted by him in the Lord

Mayor's Court, to which the bill related, to the solicitors of that Defendant, or from one of the Defendants to another of them, for the purpose of being communicated to the solicitor of the latter, with a view to his defence in this litigation. Held that such of the first class of letters as were written to the Defendants by their solicitors, in that character merely, were privileged, but that all the other documents and letters ought to be produced. [*Goodall v. Little*]

155

3. During a revolution in Sicily, the revolutionary government sent two of the Defendants, who were natives and inhabitants of Sicily, as envoys to this country, and afterwards, remitted to them monies, which had been contributed by many thousands of the inhabitants of Sicily, with directions to purchase a steam-ship therewith; and the Defendants applied the monies accordingly. The lawful sovereign of Sicily, after he had re-established his authority, filed a bill, claiming the ship, which still remained in the port of London. The Defendants, in their answer, admitted the possession of documents relating to the matters in the bill, but said that they held them *as the agents and on the behalf of the persons who intrusted them with the monies*, and submitted that, *in the absence of such persons*, they ought not to be ordered to produce the documents. The Court, however, made the order, because the Plaintiff represented the contributors of the monies; and the revolutionary government being at an end, the Defendants had either ceased to be agents or trustees for any one, or had become agents or

trustees for the plaintiff. [*King of the Two Sicilies v. Willcox*] 301

4. A Defendant, a foreigner sojourning in this country, declined to produce documents, because they would expose him to criminal prosecution in his own country: but the Court made the order. [*King of the Two Sicilies v. Willcox*] . . . 305

See PRIVILEGED COMMUNICATIONS, 1.

PROOF OF DEBT.

See CREDITOR'S SUIT.

PUBLIC COMPANY NOT INCORPORATED.

- A banking co-partnership which made returns to the stamp office pursuant to 7 Geo. IV. c. 46, held to be a public company not incorporated within the meaning of 1 & 2 Vict. c. 110, sect. 14. [*Macintyre v. Connell*] . . . 225

RAILWAY COMPANY.

1. After a railway company had purchased a piece of land from A., who was mentioned in the book of reference to be the owner of it, B., a neighbouring land-owner, part of whose land the company had also taken, claimed to be owner of the piece of land, and filed a bill for an injunction to restrain the company from continuing in possession of it, and from committing waste on it. But the Court refused the injunction. [*Webster v. The South-Eastern Railway Company*] . . . 272
2. A railway Act enacted that the railway should be constructed, in all respects to the satisfaction of the engineer of the Great Western (a broad-gauge railway) and that it should be formed of such gauge, and according to such mode of con-

struction as to admit of its being worked continuously with the Great Western. The Court was of opinion that the railway might be constructed on the narrow gauge as well as the broad. [*Beman v. Rufford*] 550

See AGREEMENT, 2, 3. — LANDS CLAUSES ACT, 1, 3.

RAILWAY CLAUSES ACT.

See LANDS CLAUSES ACT, 1.

RECEIVER.

See JUDGMENT DEBT.

REDEMPTION.

A judgment creditor, whose judgment was registered pursuant both to the Registry Act for the West Riding of Yorkshire (5 & 6 Anne, c. 18), and the 1 & 2 Vict. c. 110, filed a bill to redeem a prior mortgage of lands in the West Riding, and to foreclose the mortgagor. The mortgagor had confessed other judgments, and the conusees had registered them pursuant to the 1 & 2 Vict. c. 110, but not under the *West Riding Act*. Held that those conusees were not necessary parties to the suit. [*Johnson v. Holdsworth*] 106

See EQUITY OF REDEMPTION.—MORTGAGOR AND MORTGAGEE, 1, 2.

REGISTRY ACTS.

See PARTIES AND PLEADING, 1.

REINVESTMENT OF COMPENSATION MONEY.

Money paid into Court by a railway company, for land taken under the Lands Clauses Act, from a person who was in a state of mental imbecility, and who continued in that state until his death, but was not

the subject of a commission of lunacy, ordered, after his death, not to be reinvested in, or considered as land, but to be paid to his executors. [*Flamank, ex parte*] 260

See LIVERPOOL DOCK ACTS.

RESIDUARY DEVISE AND BEQUEST.

Testator bequeathed Greenacre to Catherine S. for life, with remainder to her son John S., in fee; provided, that if he should die in his mother's lifetime, then and in such case, the testator gave Greenacre, together with all the residue of his real and personal estate, to trustees, in trust for Isabella A. for life, remainder in trust, as to one-fourth, for such persons as she should appoint by will; and upon further trust, to divide, convey, assign, and transfer all the rest, residue and remainder of the trust property, unto and to the use of Maria C., Rose B., and John S., absolutely. John S. survived his mother, and Isabella A. died intestate. Held that the trustees took the residuary real estate on the testator's death; and that Maria C., Rose B., and John S., were not entitled to the one-fourth of the property, which was subjected to Isabella A.'s appointment, but that it was undisposed of. [*Simmons v. Rudall*] 115

RESIDUARY LEGATEE.

See CLAIM.

RESTRAINT ON ANTICIPATION.

A testator, after having bequeathed a sum of stock in trust for the separate use of his wife for her life, directed that it should remain, during

her life, and be, under the order of the trustees, made a duly administered provision for her, and the interest of it given to her, *on her personal appearance and receipt*, by any banker the trustees might appoint. Held that the wife was not prohibited from alienating her interest in the stock. [*Ross's trust*] 196

REVOCATION.

See WILL, 3.

SCHOOL.

The owner of an estate covered it with houses, and sold some of them subject to a covenant not to carry on any trade, *business or calling*, therein, or to otherwise use or suffer the same to be used, to the annoyance, nuisance or injury of any of the houses on the estate, Held that the carrying on of a girls' school in one of the houses, was a breach of the covenant; and that the covenantee had not waived the benefit of the covenant, though he had permitted other houses held under the like covenant, to be used as schools. [*Kemp v. Sober*] 517

SECRETARY'S SALARY.

A., who had been appointed secretary to a joint-stock company at a yearly salary to commence on the 25th of March, 1848, signed an agreement that no director or shareholder of the company, should be personally responsible for the salaries of any of the officers; and that no officer should be paid for his services, until a sufficient sum should be obtained, *by the funds of the company*, for that purpose. An order for winding up the company was made on the 23rd of February, 1850. Held that the agreement

did not exonerate the shareholders from liability to contribute, *as members of the company*, to the payment of arrears of salary due to the secretary; and that though he was not, in strictness, entitled to more than a portion of his salary for the second year, yet, as he had served for nearly the whole of that year, it was but reasonable to allow him his salary for the whole of it. [*Cope's case*] 54

SECURITY FOR COSTS.

See PRACTICE, 2.

SEPARATE PROPERTY.

A testator, after having bequeathed a sum of stock in trust for the separate use of his wife for her life, directed that it should remain, during her life, and be, under the order of the trustees, made a duly administered provision for her, and the interest of it given to her, *on her personal appearance and receipt*, by any banker the trustees might appoint. Held that the wife was not prohibited from alienating her interest in the stock. [*Ross's trust*] 196

SOLICITOR AND CLIENT.

See ANSWER, 1, 2 —PRIVILEGED COMMUNICATIONS, 1, 2, 3.

SPECIFIC PERFORMANCE.

A. agreed to purchase part of an estate, on the faith of representations made to him by the vendor's agent, that the vendor would do certain acts on the remainder of the estate. Those acts, however, were not done; in consequence of which, the value of the land purchased was considerably diminished. A bill for specific performance, filed by persons claiming under the

vendor, was dismissed with costs.
[*Myers v. Watson*] . . . 523

See AGREEMENT, 3.

STATUTE OF LIMITATIONS.

A testator died, in 1821, having devised and bequeathed his real and personal estate to trustees upon certain trusts. In 1826 a bill was filed for the execution of the trusts as to the *personal* estate. In 1847 a supplemental bill was filed raising questions on the will, as to the *real* estate, in which the heir, who was then unknown, was interested: and, in 1849, another supplemental bill was filed to bring the heir, who was then ascertained, before the Court. Held that the heir was barred, by lapse of time, from claiming the real estate adversely to the trustees; but that he was not barred from claiming part of the real estate, as being, in the events that had happened, undisposed of and held, by the trustees, in trust for him. [*Simmons v. Rudall*] . . . 115

STATUTE OF 1 & 2 VICT. c. 110.

A banking co-partnership which made returns to the stamp office pursuant to 7 Geo. IV. c. 46, held to be a public company not incorporated within the meaning of 1 & 2 Vict. c. 110, sect. 14. [*Macintyre v. Connell*] . . . 225

See DEBTOR AND CREDITOR, 1.

STAYING PROCEEDINGS IN A SUIT.

Pending a suit by the shareholders against the directors of a joint-stock company, one of the Defendants obtained an order under the 11th and 12th Vict. c. 45, for winding up the affairs of the com-

pany. Some time afterwards, the *Plaintiffs* moved that all further proceedings in the suit, might be stayed, until the affairs of the company had been wound up under the order. The Court refused the motion with costs. [*Deeks v. Stanhope*] . . . 439

SUPPLEMENTAL BILL.

A Defendant to an *interpleading* suit, may, after decree, file a supplemental bill to bring a new party before the Court, without making the other parties to the original suit, parties to it. [*Lyne v. Pennell*] . . . 113

TACKING.

See MORTGAGOR AND MORTGAGEE, 1.

THELLUSSON ACT.

A direction in a will to accumulate the income of trust funds for twenty-one years after the testator's death, and, at the expiration of that term, during the minorities of the persons entitled under the trusts: Held to be good only for the twenty-one years. [*Wilson v. Wilson*] 288

TITLE.

See POWER, 2.

TITLE OF HONOUR.

See CONDITION, 2.

TRUST.

Testator, by his will, gave personal property to his wife, absolutely, for her own use and benefit. By a codicil, which was in the form of a letter to his wife, he said: "It is my wish that you should enjoy everything in my power to give, using your judgment as to where to dispose of it amongst your children when you can no longer enjoy it

yourself: but I should be unhappy if I thought it possible that any one not of your *family*, should be the better for what, I feel confident, you will so well direct the disposal of." Held that the word, 'family,' was not confined to children, but included descendants in every degree; and that the wife was entitled to the property, absolutely, and not merely for her life with a power in the nature of a trust for her children. [*Williams v. Williams*]

358

TRUSTEES.

1. The surviving trustee of a sum of stock, neglected, for twenty-eight days after a request in writing had been made to him by persons who had been duly appointed new trustees, to transfer the stock to them. The Court held that they were *persons absolutely entitled* to the stock, within the meaning of the Trustee Act, 1850, and ordered the stock to be transferred to them. [*Russell's trust*] 404
2. A power of sale in a settlement, was given to A. and B., the trustees to preserve contingent remainders, and the survivor of them and the executors and administrators of the survivor: Held that trustees appointed by the Court in the place of A. and B. could not exercise the power. [*Newman v. Warner*] 457

See WESLEYAN CHAPEL.

VENDOR AND PURCHASER.

- A. agreed to purchase part of an estate, on the faith of representations made to him, by the vendor's agent, that the vendor would do certain acts on the remainder of the estate. Those acts, however, were

not done; in consequence of which the value of the land purchased, was considerably diminished. A bill for specific performance, filed by persons claiming under the vendor, was dismissed with costs. [*Myers v. Watson*] . . . 523

See POWER, 2.

VESTING.

See CONSTRUCTION, 3.

VICE-CHANCELLOR (JURISDICTION OF).

See MORTGAGOR AND MORTGAGEE, 4.

VOLUNTARY DEED.

- A. conveyed all his property to three of his creditors, in trust to pay the debts due, from him, to themselves and to his other creditors who should execute the deed.—The trustees and some of the other creditors, *executed the deed*, but with notice that B. had a demand upon A. and was about to enforce it.—Afterwards B. filed a bill, against A. and the trustees, to set aside the deed, on the ground that it was a mere voluntary deed of agency.—The Court, at the hearing, dismissed the bill, with costs. [*MacKinnon v. Stewart*] 76

WAIVER.

See COVENANT.

WESLEYAN CHAPEL.

The trust deeds of certain Wesleyan Methodist chapels, contained powers of raising money, by mortgage, for the purposes of the trusts. Held that any of the trustees of the chapels might be mortgagees under

this power, and that, if they were such mortgagees, they might exercise all the rights of mortgagees, although in opposition to the trusts. [*Attorney-General v. Hardy*] 338

WILL.

1. Testator gave all his property to trustees, in trust to pay an annuity to his wife, and, subject to that payment, to convey, assign or transfer, all his property, unto and equally between his children, when and as they severally attained twenty-one; and, in the mean time, to pay, to his wife, or otherwise apply the rents and proceeds of their respective shares for or towards their respective maintenance, education, and advancement. But, in case of the decease of any of the children under twenty-one, then upon trust to convey, assign or transfer the shares of such of them as should so die, and the accumulations, if any, unto and equally between such of them as should attain twenty-one. The testator's widow maintained and educated the children for several years, and advanced three of them, out of the income received by her from the testator's property, exclusive of her annuity; and, the income being more than sufficient for those purposes, a considerable surplus remained in her hands. Held that the surplus belonged, not to the children, but to the widow. [*Browne v. Paull*] 92
2. Testator bequeathed Greenacre to Catherine S. for life, with remainder to her son, John S., in fee; provided that if he should die in his mother's lifetime, then and in such case, the testator gave Greenacre, together with all the residue of his

real and personal estate, to trustees, in trust for Isabella A. for life, remainder in trust, as to one-fourth, for such persons as she should appoint by will; and upon further trust, to divide, convey, assign and transfer all the rest, residue and remainder of the trust property, unto and to the use of Maria C., Rose B., and John S. absolutely. John S. survived his mother, and Isabella A. died intestate. Held that the trustees took the residuary real estate on the testator's death; and that Maria C., Rose B. and John S. were not entitled to the one-fourth of the property which was subjected to Isabella A.'s appointment, but that it was undisposed of. [*Simmons v. Rudall*] 115

3. A testator who died in 1821, struck the name of one of the devisees out of his will, and interlined the names of two other persons above the erasure; but those alterations were not noticed in the attestation clause, nor was there anything to show, or from which it could be inferred that they were made before the will was executed. Held that they did not affect the devise. [*Simmons v. Rudall*] 115
4. Testator bequeathed the residue of his personal estate to trustees, in trust for his wife, during her widowhood, and, after her death or second marriage, in trust to be divided, share and share alike, among his five sisters and their respective families, if any. Held that each sister and her children living at the testator's death, were entitled, in remainder expectant on the death or second marriage of the widow, to one-fifth of the residue, as joint tenants. [*In re Parkinson's trust*] 242
5. John William Earl of Bridgewater

devised his freehold estates to trustees, in trust to convey them to the use of Lord Alford, his great nephew, for ninety-nine years if he should so long live; remainder to trustees and their heirs during the life of Lord Alford, in trust to preserve contingent remainders; remainder to the use of the heirs male of the body of Lord Alford with divers remainders over: provided that if Lord Alford should die not having acquired the title of Duke or Marquis of Bridgewater, *the estate directed to be limited to the heirs male of his body, should cease*, and the estates should, thereupon, go over and be enjoyed according to the subsequent uses and limitations directed by his will. Lord Alford died leaving a son; but without having acquired the title. Held that the proviso was valid. [*Egerton v. Brownlow*] 464

6. Testator directed the dividends of his residue to be paid to his three children A. B. and C in certain shares, and that, after the decease of any one or two of them until the decease of the survivor, the shares of the deceased parents, should go to their respective children; and that after the decease of his surviving child, the capital of the residue should be divided amongst the children of his said children, *per capita*. A. died first, B. next, and C. last. Both A. and C. left children, some of whom were living at C.'s death. B. had children, but they all died in her lifetime. Held, nevertheless, that they took vested, transmissible interests in the divi-

dends of B.'s share of the residue, which accrued between B.'s and C.'s death. [*Homer v. Gould*] 541

7. Testator gave 4000*l.* to his granddaughter, and directed his executors to pay it to her on her attaining twenty-one, and to apply the interest of it for her maintenance, during her minority. By a codicil, he directed that his granddaughter should have only the interest of 2000*l.* for her maintenance, until she attained twenty-three, and that the interest of the other 2000*l.* should be accumulated, and that, on her attaining twenty-three, his executors should have the whole settled upon her for her life, and, after her death, to her child or children, in equal proportions, so that no husband of hers might spend it. The granddaughter attained twenty-three, and died without having had a child and without the executors having made any settlement of the legacy. Held that the gift in the will, was an absolute gift, and that, in the events that had happened, it was not affected by the codicil. [*Bell v. Jackson*] 547

See LEGACY, 2.—POWER, 1.—
RESTRAINT ON ANTICIPATION.—
TRUST.

WITNESS.

A defendant or witness, if interrogated as to matters tending to criminate him, may decline to answer at any time, notwithstanding what he has disclosed may be sufficient to criminate him. [*King of the Two Sicilies v. Willcox*] 301

J. H. Walpole

R E P O R T S
OF
C A S E S
DECIDED IN THE
HIGH COURT OF CHANCERY,
IN 1851 AND 1852,

BY
THE RIGHT HON. LORD CRANWORTH,
AND
SIR RICHARD TORIN KINDERSLEY,
VICE-CHANCELLORS.

BY NICHOLAS SIMONS, M.A.,
and Barrister-at-Law.

WITH SOME CASES REPORTED BY
C. STEWART DREWRY, ESQ.
of the Inner Temple, Barrister-at-Law.

- BEING
VOL. II. OF THE NEW SERIES OF SIMONS'S REPORTS.

LONDON:
V. & R. STEVENS AND G. S. NORTON,
Law Booksellers and Publishers,
(Successors to the late J. & W. T. CLARKE, of Portugal Street,)
26, BELL YARD, LINCOLN'S INN;
AND HODGES & SMITH, GRAFTON STREET,
DUBLIN.

MDCCCLII.



*** * *** The Cases contained in this Volume, down to p. 191, are reported by MR. SIMONS. The remaining Cases are reported by MR. DREWRY, by whom the Reports of Cases determined by Vice-Chancellor KINDERSLEY will be henceforth continued.

Lord TRURO	}	Lords Chancellors.
Lord St. LEONARDS		
Sir JOHN ROMILLY		Master of the Rolls.
Sir JAMES LEWIS KNIGHT BRUCE .	}	Lords Justices.
Lord CRANWORTH		
Sir GEORGE JAMES TURNER . .	}	Vice-Chancellors.
Sir JAMES PARKER		
Sir RICHARD TORIN KINDERSLEY .		
Sir A. COCKBURN	}	Attorneys-General.
Sir F. THESIGER		
Sir W. PAGE WOOD	}	Solicitors-General.
Sir FITZROY KELLY		

T A B L E
OF THE
CASES REPORTED
IN THIS VOLUME.

A.	Page		Page
ANONYMOUS . . .	54	Cross v. Beavan . . .	53
B.		D.	
Beavan, Cross v. . . .	53	Davies, <i>Ex parte</i>	114
Boulton, Pidduck v. . . .	223	De Held, Soltau v. . . .	133
Bourne v. Buckton	91	Durnford, Miles v. . . .	234
Bryan's Trust, <i>In re</i>	103	G.	
Buckton, Bourne v. . . .	91	Gray v. Gray	273
C.		H.	
Chepstow, Gloucester, and		Ham's Trust, <i>In re</i>	106
Forest of Dean Railway		Harcourt v. Seymour	12
Company, <i>In re</i>	11	Hyde, Plowden v. . . .	171

		Page			Page
J.			Rochdale Canal Company		
Jones v. Morrall . . .		241	v. King		78
K.			S.		
King, Rochdale Canal Com- pany v.		78	Sewell v. Moxsy		189
L.			Soltau v. De Held		133
Lloyd v. Lloyd		255	Southey, Westwood v. . .		192
M.			Spooner's Trust, <i>In re</i> . .		129
Miles v. Durnford . . .		234	Stapleton v. Stapleton . .		212
Morrall, Jones v. . . .		241	Sutcliffe, Wood v. . . .		163
Moxsy, Sewell v. . . .		189	Seymour, Harcourt v. . .		12
P.			T.		
Parkin v. Thorold . . .		1	Terrell's case		126
Pidduck v. Boulton . . .		223	Thorold, Parker v. . . .		1
Plowden v. Hyde		171	W.		
R.			Webb v. Wools		267
Robinson, Woodman v. . .		204	Westwood v. Southey . .		192
			Wiggins v. Wiggins . . .		226
			Wood v. Sutcliffe		163
			Woodman v. Robinson . .		204
			Wools, Webb v.		267

CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLORS

LORD CRANWORTH AND SIR R. KINDERSLEY.

PARKIN v. THOROLD.

THIS was a suit for specific performance, by the vendors against the purchaser of a freehold estate in *Devonshire*. The agreement was dated the 25th of July 1850, and stipulated that the abstract should be delivered within ten days, and that the purchase-money should be paid and the purchase be completed on or before the 25th of October following.

The abstract was delivered on the 1st of August 1850; and, on the same day, the Defendant's solicitors went to the office of a solicitor in *Exeter*, in whose custody the Plaintiff's solicitor informed them the deeds were, for the purpose of comparing the abstract with the deeds; but only some of the deeds were produced; and, in particular, a settlement dated in September 1804, which was very material to the title, and was very imperfectly abstracted, was not produced. In consequence of this, the

1851:

2nd and 14th
June.

*Specific per-
formance.
Vendor and
Purchaser.
Agreement.*

A purchase was to be completed on the 25th of October. Before that day arrived, the purchaser, at the vendor's request, extended the time to the 5th of November. The title, however, was not completed on that day.

Held that

the purchaser was at liberty to abandon the contract.

1851.

PARKIN
v.
THOROLD.

Defendant's solicitors wrote to the Plaintiff's solicitor, on the 8th of August, requesting that a full abstract of the settlement might be sent to them, and desiring to be informed where the original might be inspected. On the 28th of August, the Plaintiff's solicitor answered that the settlement, as he was informed, was in the office of the Defendant's solicitors, or in the possession of a gentleman named *Rawden*, one of their clients. On the 31st, the Defendant's solicitors replied that the settlement was not in their possession; that Mr. *Rawden* had been dead some years, and that they did not believe that the settlement had ever been in his custody. Several other letters on the subject of the settlement, passed between the solicitors: and, on the 10th of September 1850, the Defendant's solicitors, who had then procured a document which purported to be a copy of the settlement, wrote, to the Plaintiff's solicitor, as follows:—"As desired, we beg to forward, to you, this copy settlement, which was made from a copy obtained from our agents in *London*, who have promised us to make a further search for the original:" and three days afterwards, they wrote, to the Plaintiff's solicitor, as follows:—"Have you ascertained where the original settlement of 1804 is, that we may inspect it; which we are desirous of doing without delay?" On the 17th of October 1850, the Plaintiff's solicitor, in answer to a letter from the Defendant's solicitors, pressing the completion of the purchase, wrote as follows:—"I only require time to be able to find the settlement. I believe I have found out where it is." On the 21st of October, at which time the Plaintiff's solicitor had not produced the settlement or informed the Defendant's solicitors where it was, the latter gave the former notice, in writing, that, unless the settlement was produced, and the other requisitions and observations on the title (which they had sent to the

Plaintiff's solicitor on the 14th August preceding), were complied with and satisfied on or before the 5th of November following, the Defendant would consider and treat the contract as at an end, and require the deposit which he had paid, to be returned. The notice was not complied with : in consequence of which the Defendant's solicitors wrote, to the Plaintiff's solicitor, on the 7th of November, requesting that the deposit might be returned. On the 8th, the Plaintiff's solicitor informed the Defendant's solicitors, that he had found the settlement, and should be able to produce it in a very few days. On the 9th, the Defendant's solicitors peremptorily demanded the deposit, and added that, if they did not receive it in a few days, they should issue a writ for the recovery of it. On the 8th January 1851, the Plaintiff's solicitor informed the Defendant's solicitors that he was then in a situation to produce the settlement, and that they might inspect it, in *London*, at any time convenient to themselves, upon giving him reasonable notice. On the same day, the Defendant's solicitors replied that their client (as they had repeatedly informed the Plaintiff's solicitor) had abandoned the contract, and that they had been expecting, for a long time, the deposit to be remitted to them ; and that, unless they received it at once, they should have no alternative but to commence proceedings for the recovery of it : which they did in the following month.

1851.
 PARKIN
 v.
 THOROLD.

On the 1st of March, the bill was filed charging that time was not of the essence of the contract ; that no damage had arisen, to the Defendant, from the noncompletion of the contract at the time mentioned in the agreement, and that the Plaintiffs had not been guilty of any unreasonable delay, but had proceeded, with all reasonable despatch, to complete the contract : and praying that the Defendant

1851.

PARKIN

v.

THOROLD.

might be decreed to perform the agreement, and might be restrained from proceeding with his action.

The Defendant, in answer to the charge that no damage had arisen to him from the noncompletion of the contract at the time mentioned in the agreement, said that he had lost the interest on his deposit-money, and incurred costs and charges to a considerable amount in and about the investigation of the vendors' title to the estate; and that, between the time of the sale and the 5th of November 1850, he was prevented from seeking any other investment for the purchase-money he had agreed to pay for the estate; and that he had lost the benefit he expected to derive from the purchase of the estate; which, at the time when the contract was entered into, was let on lease; but, since the said 5th of November, the lessee had quitted with the assent of the vendors, although the term granted by the lease had not expired, and the estate had been ever since and still was on the vendors' hands.

The injunction prayed for by the bill having been obtained, and an order *nisi* for dissolving it having been made,

Mr. *Stuart* and Mr. *Terrell*, for the Plaintiffs, showed cause against making the order *nisi* absolute.

Mr. *Speed* appeared for the Defendant.

14th June.

The VICE-CHANCELLOR:

The agreement which is the subject of this suit, was dated on the 25th of July 1850. It stipulated that the abstract of the vendors' title to the estate contracted to be sold, should be delivered, to the purchaser, within ten days from the 25th of July, and that the purchase should

be completed on or before the 25th of October following, which was three months from the date of the agreement. The abstract was delivered on the 1st of August, which was within the time specified. On the same day, the Defendant's solicitors went to the office of a solicitor at *Exeter*, for the purpose of comparing the abstract with the original deeds. Some of the deeds were produced ; but others, and amongst them, a settlement dated in 1804, was not produced. On the 8th of August, the Defendant's solicitors applied to the Plaintiff's solicitor for a full abstract of the settlement, and desired to be informed where they could inspect the original. On the 14th, they sent, to the Plaintiff's solicitor, their observations on the title as it then stood, one of which was that the settlement must be fully abstracted and the original produced for their inspection. On the 28th the Plaintiff's solicitor wrote to the Defendant's solicitors, stating that the settlement was in their office. On the 31st, the Defendant's solicitors sent an answer, denying all knowledge of the settlement. On the 10th of September the Defendant's solicitors acknowledged the receipt of a paper purporting to be a copy of the settlement. On the 13th they wrote, to the Plaintiff's solicitor, as follows :—
“ Have you ascertained where the original settlement is that we may inspect it, which we are desirous of doing without delay ?” On the 17th of October the Plaintiff's solicitor wrote, in answer, that he only required time to be able to find the settlement, and that he believed he had found out where it was. On the 21st, the Defendant's solicitors gave the Plaintiff's solicitor notice that, unless the settlement was produced and the title to the estate completed by or before the 5th of November then next, the Defendant would consider the contract as at an end and require his deposit to be returned. The settlement was not produced by the 5th of November ; and, on

1851.

PARKIN

v.

THOROLD.

1851.
 PARKIN
 v.
 THOROLD.

the 7th, the Defendant's solicitors demanded the deposit, and, afterwards, brought an action to recover it. On the 1st of March 1851, the present bill was filed; shortly after which the Plaintiff obtained an injunction to restrain the action, for want of answer. The answer was filed on the 23rd of April; and, an order *nisi* for dissolving the injunction having been thereupon obtained, cause was shown against dissolving it on the 2nd of this month: and I have now to decide whether the cause then shown was sufficient.

The Plaintiff admits that he has failed to perform his contract according to its legal construction; that is, that it was an essential term of the contract, according to its legal construction, that he should make out a title before a certain day, and that he has failed in doing so. The question then is whether he has any equity to prevent the Defendant from asserting his legal right.

The jurisdiction of this Court to decree specific performance depends, entirely, on contract: and the principle upon which it exercises that jurisdiction, is that damages, which are the only redress that a party complaining of a breach of contract can obtain at law, are an inadequate remedy. The relief is different; but the foundation for it is the same in both Courts, namely, the contract. Consequently, the first point to be ascertained, is what is the contract? This must be decided from the terms of the contract itself; and not at all from the peculiar doctrines of the Court in which a party injured by the breach of it, may happen to seek redress. In the case of a written contract, the same words must, surely, have the same meaning, whether they are construed by a Court of Law or a Court of Equity. When, therefore, it is once ascertained that the contract of a purchaser is

that he will purchase if a title is made by a given day, but, otherwise, that he will not, I apprehend, if there is nothing more, that a Court of Equity cannot, any more than a Court of Law can, give relief to a vendor who has failed to make a title at the day specified. Lord *Thurlow's dictum* importing that a purchaser could not so stipulate, manifestly rests on no principle, and has been often repudiated as not truly expressing the doctrine of this Court. Such a restriction would be a most unwarrantable interference with the freedom of contracts, without any principle for its justification. When, therefore, a contract has been entered into by which a Court of Law decides that the purchaser is not bound unless a title be made before a given day, if a Court of Equity gives relief, it must be, not on the ground that it puts, on the words of the contract, a construction different from that put on it at Law, but because there are grounds, collateral to the contract, on which it can found a jurisdiction warranting its interference. What then are those grounds? I answer the conduct of the contracting parties. Though the terms of the agreement stipulate for the completion of the purchase on a given day ; yet, if the parties have dealt together on the footing that the contract should be construed as a contract to complete in a reasonable time, this Court acts on *that* as the real contract to be enforced. There is, no doubt, some difficulty in reconciling this, which is certainly the doctrine of the Court, with the Statute of Frauds. A contract to purchase if a title is made on a given day, is not the same contract as a contract to purchase if a title is made in a reasonable time ; and so, to admit parties, by agreement not in writing (and conduct is but evidence of agreement), to substitute the latter for the former contract, is, in truth, to give effect to a contract relating to lands not reduced into writing and signed by the party to be

1851.
 PARKIN
 v.
 THOROLD.

1851.

PARKIN

v.

THEOROLD.

charged ; and this cannot be done consistently with the Statute of Frauds, as was decided, by the Court of Common Pleas, in *Stowell v. Robinson* (a). Perhaps this Court has acted on the ground that it would be a fraud in a purchaser, after dealing with a vendor on the footing that he did not consider the time fixed as material, to turn round and insist on the strict terms of the written contract ; or it may be that the Court has, from the conduct of the parties, felt itself warranted in inferring that the day named was intended only as a security for performance in a reasonable time ; and so, has dealt with it as in the nature of a penalty. Be this, however, as it may, whatever be the foundation of the doctrine of the Court, there is no doubt of its existence ; that is, though the contract, according to its terms, is that the purchase shall be completed on a given day, and is so framed that, if not completed on that day, the purchaser is, at Law, entitled to recover back his deposit ; yet, if the parties deal together on the footing of having disregarded the appointed day ; as having, according to the ordinary language used, agreed to treat time as not being of the essence of the contract, then this Court will give relief, although the day for completion may have passed. But this relief is, as I have already stated, given, solely, on the ground of such dealing of the parties. I have not been able to discover any case, in modern times at all events, in which the Court compelling the purchaser to complete the purchase after the appointed day, has not proceeded on this ground. In *Seton v. Slade* (b) (a leading case on this subject), Lord *Eldon* expressly says : " There is no authority that has not some reference to the conduct of the parties : " and I find similar expressions in almost all the subsequent cases. Whether the

(a) 3 Bing. N. C. 928.

(b) 7 Ves. 265.

facts have, in all the cases, been such as fairly to warrant the inference relied on ; whether this Court has not, sometimes, made a new contract for the parties, and so enforced, on the purchaser, the performance of what he never undertook to do, is not the point for decision. It is sufficient to say that the ground on which the Court has professed to proceed, has always been that the parties have so acted as to enable it either to give, to the original contract, a meaning different from its *primâ facie*, obvious import, or else to say that the original contract, so far as relates to the time fixed for its completion, has been abandoned, and a new and more extended one has been, by implication, entered into.

1851.
PARKIN
v.
THOROLD.

Applying these principles to the present case, *I can see nothing whatever warranting me in saying that the Defendant ever abandoned his right to insist on the completion at the specified day.* Within a few days after the delivery of the abstract, he insisted on the production of the settlement of 1804 : and he had a right so to insist. The production was necessary to the establishing of the title ; otherwise the Defendant's action for the recovery of the deposit would fail, and no injunction would be necessary. Many letters passed, and the Defendant, by his solicitors, continued to insist on the production of the deed. The contract was to be completed on the 25th of October, that is, three months from its date ; and, on the 17th of that month, the Plaintiff's solicitor wrote to the Defendant's solicitors, asking for further time to enable him to procure the settlement. On the 21st, the Defendant's solicitors wrote and sent, to the Plaintiff's solicitor, a formal notice giving him what he had asked for, namely, an extension of time to the 5th November, but stating that, unless by that day the settlement was produced and the title made good, the

1851.
 PARKIN
 v.
 THOROLD.

Defendant would consider the contract as at an end. The settlement was not produced; and so, on the 7th of November, the Defendant's solicitors finally gave notice of abandonment: and I think they had a perfect right so to do. The Defendant was at liberty to insist on completion on the 25th of October. *He never did any act to forfeit this right, except by voluntarily extending the day, for the convenience* and at the request of the Plaintiff, to the 5th of November: and, default having been then made, the Defendant was in the same position as if he had never allowed any extension, and had refused to go on with the contract after the 25th of October.

I may remark, as indeed I did at the time of the hearing, that the case of *King v. Wilson (c)*, has no bearing on the present question. There, the parties had clearly waived the day fixed for completion, and negotiations proceeded, after that day, on the subject of the title. Pending these subsequent negotiations, the purchaser gave notice that, unless everything was completed in a week, he would be off his bargain. Lord *Langdale* held that he could not do this: but the ground of that decision was that, by dealing with the vendor after the appointed day, the purchaser had agreed to treat the contract as an open contract, to be performed if the title was completed in a reasonable time, and that a week was not a reasonable time. This has obviously no bearing on the case.

The result is that the Defendant in this case, was at full liberty to bring his action for recovering back his deposit; and so, the order *nisi* for dissolving the injunction, must be made absolute.

*See Re The Anglo-Californian Gold Mining Co.
Ex parte Paddy & Hornsby 10 H.L. 509.*

IN THE MATTER OF THE WINDING-UP ACTS,
AND OF THE CHEPSTOW, GLOUCESTER,
AND FOREST OF DEAN RAILWAY COM-
PANY.

1851 :
7th and 19th
July.

*Joint-stock Com-
panies Winding-
up Acts.*

THE attempt to form the above-mentioned Com-
pany, was abandoned in 1846 ; and, on the 25th of
January 1850, an order for winding up its affairs, was
made on a petition presented by a gentleman named
Mann, who had been a shareholder in the Company.
More than a twelvemonth after the making of that
order, and after an official manager had been appointed
and other proceedings under it had taken place in the
Master's office, the directors of the Company presented a
petition praying that the order might be discharged, on
the ground that *Mann*, when he obtained it, had no
interest in the affairs of the Company ; inasmuch as, not
long after the abandonment of the undertaking, the
directors returned him a certain portion of the deposits
on his shares, and he agreed to accept the amount in
full satisfaction of all demands upon the Company and
the directors.

A petition to
discharge a
winding-up
order, dismissed
with costs, on
account of delay
in presenting it.

Mr. *Stuart* and Mr. *Terrell*, supported the petition.

Mr. *Bethell* and Mr. *Glasse* opposed it.

The VICE-CHANCELLOR said that, as the petitioners
had suffered more than a twelvemonth to elapse before
they applied to discharge the order, and as an official
manager had been appointed, and the winding-up of the

1851.
 IN RE THE
 CHEPSTOW,
 GLOUCESTER
 AND FOREST OF
 DEAN RAILWAY
 COMPANY.

Company had been proceeded with, and, thereby, expense had been incurred, he should dismiss the petition with costs.

1851:
 14th, 16th 21st
 and 23rd July.

Conversion.
 Election.

HARCOURT v. SEYMOUR.

BY the settlement or articles for a settlement made in contemplation of the marriage of *William Harcourt* with *Mary Lockhart* widow, dated the 21st of September 1778, *William Harcourt* assigned the sums of 5000*l.*,

21st September
 1778. Settle-

ment or articles on the marriage of *William* afterwards *Earl Harcourt*.

By a marriage settlement, dated in 1778, 32,000*l.* was directed to be invested in land which was to be conveyed to the use of the husband for life; to the use that the wife might receive a jointure of 300*l.* a year; to the use of trustees for a term to secure the jointure and to raise 5000*l.* for the wife after the husband's death; to the use of trustees for another term, to raise portions for the children of the marriage, and to the use of the husband's right heirs. There never was any issue of the marriage. The trustees invested 20,000*l.* of the 32,000*l.* on mortgage, and the rest, in the funds. In 1823, the husband made a statement of *his personal property*, in which he included both the mortgage-money and the stock. In 1828, he and the mortgagee and one of the trustees executed a deed by which the mortgage-money as well as the interest of it was treated as payable to him, *his executors or administrators*, and by which he covenanted that the principal should not be called in, for five years, by him, *his executors or administrators*, or by the trustees, in case the interest should be regularly paid. Afterwards, in the same year, he made his will, by which he made a provision for his wife (which she accepted) in satisfaction of the provision made for her by the settlement; and devised all his real estates to trustees in trust to convey them to certain of his relations for their lives, successively, with remainders to their first and other sons in tail male, and, ultimately, to his own right heirs: and he gave 80,000*l.* to the same trustees, and directed them to invest it in land, and to settle the land in the same manner as he had directed his real estates to be settled. He died in 1830.

Held that he had elected to treat and had treated the 32,000*l.* as part of *his personal estate*, and that it remained personalty at his death.

2000*l.*, and 25,000*l.*, to which he was entitled as therein mentioned, to his brother, *George Simon Earl Harcourt*, *William Danby*, and two other persons, in trust, with the consent of *William Harcourt* and *Mary Lockhart*, and, after both their deaths, of the proper authority of the trustees, to lay out those sums in the purchase of freehold or copyhold lands in fee simple, in possession, which were to be settled to the use of *William Harcourt* for life, with remainder to the use of trustees and their heirs during his life, in trust for him; and, after his decease, to the use that *Mary Lockhart* should receive, thereout, a yearly rent-charge of 500*l.*; and, subject thereto, to the use of other trustees, for 500 years, for better securing the payment of the rent-charge, and for raising 5000*l.*, and paying the same to *Mary Lockhart*, her executors, &c., in case she should survive *William Harcourt*, (and which, together with the rent-charge, was to be in bar of her dower); and, subject thereto, to other trustees, for 1000 years, for raising portions for the children of the marriage; and, subject thereto, to the use of the right heirs of *William Harcourt*; and it was provided that the settlement to be made of the lands so to be purchased should contain powers for leasing, selling and exchanging such lands and for investing the proceeds of the sale in the purchase of other lands, which, as well as the lands taken in exchange, should be settled to the uses thereinbefore declared: And it was declared that, until the 5000*l.*, 2000*l.*, and 25,000*l.* should be invested in the purchase of lands, the interest thereof, or of so much thereof as should not be so invested, should be paid to *William Harcourt* during his life, and that, after his decease, those sums and the interest thereof, or so much thereof as should not be so invested, should be subject to the payment of the 500*l.* a year and 5000*l.* to *Mary Lock-*

1851.
HARCOURT
v.
SEYMOUR.

1851.
 HARCOURT
 v.
 SEYMOUR.

hart, and also to the payment of the portions of the children of the marriage, and that the residue of such trust-monies *should be paid to such person or persons as, by virtue of the limitations aforesaid, would be entitled to the immediate freehold, reversion and inheritance of the lands thereby agreed to be purchased and settled.* And it was provided that, if *William Harcourt*, his heirs, executors or administrators, should, at any time thereafter, procure an estate, called *Pipwell Abbey*, then belonging to his brother, to be settled to the uses thereinbefore declared (but which he never did), then the sum of 32,000*l.*, the amount of the 5000*l.*, 2000*l.* and 25,000*l.* *should be paid, assigned and made over to him, his executors, administrators and assigns.*

Before the year 1808, 1000*l.*, part of the 2000*l.*, was paid to *William Harcourt*, and he applied it to his own use: and, in that year, the residue of the 2000*l.*, and the 5000*l.* and 25,000*l.* were paid to *George Simon Earl Harcourt* and *William Danby*, the only trustees of the settlement or articles who were then living. *George Simon Earl Harcourt* died in April 1809, and, thereupon *William Harcourt* and *Mary* his wife, became Earl and Countess *Harcourt*. In the same month *Danby*, at the request of the Earl and Countess, lent 20,000*l.*, part of the trust-monies, to Sir *George Lee*, on a mortgage, of estates in *Bucks*, made to *Danby* his heirs and assigns; and, in the same month, 11,000*l.*, the residue of the trust-funds, was laid out in Exchequer bills, which were afterwards sold, and the proceeds invested in the purchase of 12,735*l.* 3*s.* 4*d.* Navy Five *per Cents*, in *Danby's* name.

1813. Cove-
 nant by Earl
Harcourt, to in-

By an indenture dated in 1813, *William Earl Harcourt* covenanted to indemnify *Danby*, his heirs, execu-

*tors and administrators, against any loss or damage which he or they might sustain by reason of any laches or neglect which might be imputed, to him, in consequence of the trust-funds not having been invested in the purchase of real estate, as directed by the settlement, or in consequence of Danby having acquiesced in the misapplication of the 1000*l.* by William Earl Harcourt.*

By an indenture dated the 16th of April 1818, after reciting that the Earl and Countess, and *Danby* were desirous of appointing Sir *Harry Calvert*, Sir *Howard Douglas* and *George Samuel Collyer* trustees of the settlement, and that the 12,735*l.* 3*s.* 4*d.* stock had been transferred into the joint names of them and *Danby*, and that it was forthwith intended to convey, to them, the 20,000*l.** secured on mortgage of Sir *George Lee's* estates: the Earl and Countess and *Danby* appointed those gentlemen trustees of the settlement jointly with *Danby*; and it was declared that they should stand possessed of the stock and of the 20,000*l.* when the same should be conveyed to them, on the trusts of the settlement. In July 1822 the 12,735*l.* 3*s.* 4*d.* Five *per Cents*, were converted into 13,371*l.* 18*s.* 6*d.* New Four *per Cents*. The Earl never repaid the 1000*l.*: and the other part of the trust-funds continued invested as before mentioned until after his death.

The Earl made his will dated the 24th of March 1828, and thereby gave 10,000*l.* to the Countess, absolutely, and the interest of 80,000*l.*, to be set apart as thereafter mentioned, and his mansion-house at *St. Leonard's Hill*, and all his lands, tenements and hereditaments there or elsewhere, which were not otherwise disposed of by his will, for her life; and he declared that the provision thereby made for her, was in lieu and full satisfaction of all jointure, dower,

1851.

HARCOURT
v.

SEYMOUR.

demnify *Danby*, for not having invested the trust-funds in the purchase of real estate.

16th April 1818.
Appointment of new trustees of the settlement.

* *Sic.*

24th March 1828. Will of William Earl Harcourt.

1851.

HARCOURT

v.

SEYMOUR.

*thirds or other estate or interest whatsoever to which she would otherwise have been entitled, in, from or out of the property comprised in their marriage articles, or the real or personal estate whereof he might die seised or possessed ; and, after her decease, he gave his mansion-house at St. Leonard's Hill, and all the other lands and hereditaments thereby devised to her for her life, to Danby, Henry Seymour and G. C. Heath, and their heirs, in trust to pay the rents to Sophia, the wife of his relation, Charles Amedee Marquis D'Harcourt, for her life, and, after her death, to convey, settle and assure the said hereditaments to William Bernard Harcourt, the eldest son, and to the second and other sons of the Marquis and Marchioness D'Harcourt, for their lives, successively, with remainders to their first and other sons in tail male ; with remainder to George Simon Harcourt, of Cooper's Hill, for life, with remainders to his first and other sons in tail male ; with remainder to Mary, the daughter of the Marquis and Marchioness D'Harcourt, for life, with remainders to her first and other sons in tail male ; with remainder to his own right heirs : and he gave 80,000*l.* to his trustees, in trust to invest it in Government or real securities, and to pay the interest to the Countess for life, and, after her death, to the Marquis D'Harcourt for life, and, after the decease of the survivor of them, in trust to lay out the same in the purchase of freehold lands in fee simple, or of lands of copyhold or leasehold tenure convenient to be held with such freehold lands, yet so that such purchase should be made with the consent in writing of the person or persons who, for the time being, would be entitled to the rents of the hereditaments thereby directed to be purchased, and to settle and assure the same hereditaments in such manner as was thereinbefore directed with respect to his mansion-house and lands at St. Leonard's Hill after the Countess's decease :*

and he gave all the residue of his personal estate, subject to the payment of his debts, &c. to the Countess, her executors &c. or, in case of her death in his lifetime, to the Marquis, his executors &c.: and he appointed the Countess, *Heath, Collyer*, and *William Cowden*, Esq., his executors.

1851.
HARCOURT
v.
SEYMOUR.

The Earl, by a codicil dated the 27th of May 1828, revoked the trust, in his will, for payment of the rents of the hereditaments to be purchased with the 80,000*l.* to the Marchioness *D'Harcourt* during her life, and declared that it should be lawful, for the trustees of his will, to invest the 80,000*l.* in the purchase of lands, during the lives of the Countess and the Marquis or the life of the survivor of them, with their consent in writing, and after their deaths, with the consent in writing of the person for the time being entitled to the rents of the hereditaments to be purchased, and that the same hereditaments should be settled and assured to the use of the Countess, of the Marquis and of *William Bernard Harcourt* for their lives successively, with remainder to the same uses as were directed, by his will, to be limited of and concerning his estate at *St. Leonard's*, after the death of *William Bernard Harcourt*.

The Earl died in June 1830 without having had any issue by the Countess. She survived him, and accepted the provision made for her by his will, in lieu of the provision made for her by the settlement. Lord Vernon was the Earl's heir-at-law. Shortly after the Earl's death, his executors paid the legacy of 80,000*l.* to the trustees of his will.

June 1830.
Death of Wm.
Earl Harcourt
&c.

The Countess died in January 1833, having, by her

Jan. 1833.
Death of Coun-

1851.

HARCOURT
v.

SEYMOUR.

tess *Harcourt* :
will dated in
1832.

will dated in 1832, given a legacy of 15,000*l.* and her residuary personal estate to *William Bernard Harcourt*, and appointed *George Simon Harcourt*, *G. C. Heath* and *G. S. Collyer*, her executors.

In 1834 the trustees invested the 80,000*l.* in the purchase of an estate, which was conveyed to them upon the trusts of the will and codicil.

Opinions of
Counsel taken
in 1834.

Until September or October 1834, the 32,000*l.*, and the monies and funds representing it, had been considered to form part, first, of the residuary personal estate of the Earl and, afterwards, of the Countess; but it then occurred to Messrs. *Forster* and *Frere*, the solicitors to the trustees and executors of the Earl's will, that it was questionable whether those monies and funds formed part or the Earl's residuary personal estate: and, accordingly, they laid a case before Mr. *Walters*, a gentleman at the bar, who was of opinion, from the materials laid before him, that those monies and funds did not form part of the Earl's residuary personal estate, but were liable, by virtue of the settlement or articles of 1778, to be laid out in the purchase of land. *William Bernard Harcourt*, on the opinion being communicated to him, caused a case to be laid before Mr. *Pemberton Leigh* and Mr. *Christie*, two other gentlemen at the bar, who also were of opinion, from the statements contained in the case, that the settlement or articles converted the monies and funds into real estate, and that they passed, as such, under the residuary devise in the Earl's will.

8th and 9th
May 1835. Con-
veyance execu-
ted by *W. B.*

On the faith of this opinion, certain indentures of lease and release, dated the 8th and 9th of May 1835, were prepared and executed. The release was made be-

tween *William Bernard Harcourt* of the first part; the Marchioness *D'Harcourt*, who had survived the Marquis, of the second part; Sir *H. Douglas* and *G. S. Collyer*, the surviving trustees of the settlement of 1778, of the third part, and *H. Seymour* and *G. C. Heath*, the surviving trustees of the Earl's will, of the fourth part; and, after reciting the settlement and the Earl's will and codicil and his death without issue by the Countess, and the Countess's death; and after also reciting that the trust-fund comprised in the settlement, was not, nor was any part thereof ever invested in the purchase of real estate, in pursuance of the trust for that purpose contained therein, but that the same was, with the consent of the Earl and Countess, from time to time, invested on Government and real securities, which were altered as occasion required; and that the same then consisted of 34,338*l.* 7*s.* 4*d.** sterling; and that the Earl's will and codicil did not contain any specific disposition of the said fund or any part thereof; and, after further reciting (most erroneously, as the bill alleged) that no act was done to discharge the fund from the trust to lay out the same in real estate; and after further reciting (erroneously, as the bill also alleged) that the Earl being, in the event, which happened, of his having no issue by the Countess, absolutely entitled, subject to the provision made for her by the settlement, to the hereditaments to be purchased with the fund, the hereditaments so to be purchased, were comprehended in the general devise contained in his will;

* This sum was composed of the 1000*l.*, which the Earl's executors repaid to the trustees of the settlement, of 13,338*l.* 7*s.* 4*d.* the proceeds of the Four per Cents, which were reduced to Three and a Half per Cents in July 1830, and sold in August following, and of the 20,000*l.*, the mortgage for which was paid off in 1834.

1851.
HARCOURT
v.
SEYMOUR.
Harcourt in
consequence of
the opinions of
Counsel.

1851.
 HARCOURT
 v.
 SEYMOUR.

and after further reciting that the Countess accepted the provision made for her by the Earl's will and codicil, in lieu of the provision made for her by the settlement, and that she was dead; and after further reciting that Sir *H. Douglas* and *G. S. Collyer*, the surviving trustees of the settlement, in execution of the trust therein contained to lay out the said trust fund in the purchase of real estate which, in the events aforesaid, would, when purchased, be subject to a trust to convey the same to the surviving trustees under the Earl's will, upon the trusts thereby declared concerning the hereditaments thereby devised to trustees as aforesaid, had contracted, with *William Bernard Harcourt*, for the absolute purchase of the messuages and other hereditaments thereafter particularly mentioned, for the said sum of 34,338*l.* 7*s.* 4*d.*; and after further reciting that the said purchase was agreed to be made as aforesaid with the consent of the Marchioness *D'Harcourt*: It was witnessed that, in pursuance of the said contract, and in consideration of 34,338*l.* 7*s.* 4*d.* paid to *W. B. Harcourt* by Sir *Howard Douglas* and *G. S. Collyer*, as trustees under the settlement, with the privity of *H. Seymour* and *G. C. Heath*, *W. B. Harcourt* conveyed, with such privity as aforesaid, and by the direction of Sir *H. Douglas* and *G. S. Collyer*, an estate in the county of *Bucks*, which he had shortly before purchased, unto and to the use of *Seymour* and *Heath*, their heirs and assigns, upon the trusts in and by the Earl's will declared, concerning the hereditaments thereby devised, from and after the Countess's decease, to trustees and their heirs as therein and hereinbefore mentioned, or such of the said trusts as were then subsisting and capable of taking effect.*

* *Sic.*

The Marchioness *D'Harcourt* died in June 1846. She had issue, by the Marquis, two sons, *William Ber-*

nard Harcourt, George D. T. B. Harcourt, and a daughter, *Mary Harcourt*, named in the Earl's will. *Mary Harcourt* married the Count *de Castries*, and had issue a son. *George D. T. B. Harcourt* had three sons; and *George Simon Harcourt* had one son.

1851.
HARCOURT
v.
SEYMOUR.

In May 1847, *William Bernard Harcourt* died intestate, leaving *Elizabeth Georgiana Harriet Harcourt*, his widow, and three infant daughters, his co-heirs and only next of kin. His widow was his administratrix. Death of *W. B. Harcourt*.

In August 1847 *Seymour* and *Heath*, as the surviving trustees of the Earl's will, filed a bill against Lord *Vernon*, the Earl's heir, *George D. T. B. Harcourt* and his sons, *George Simon Harcourt* and his son, the Count and Countess *de Castries* and their son, *Elizabeth Georgiana Harriet Harcourt*, the widow and administratrix of *William Bernard Harcourt* and *G. S. Collyer*, praying that the Earl's will and codicil might be established and the trusts thereof performed under the direction of the Court, and that the rights and interests of all parties, under the will and codicil, in and to the real estates thereby devised and the real estates purchased with the 80,000*l.* and 34,338*l.* 7*s.* 4*d.* might be ascertained and declared, and that a proper settlement of such real estates might be executed in conformity to the trusts and directions contained in the will and codicil. Bill in *Seymour v. Vernon*.

After that bill was filed, Messrs. *Henderson* and *Leach*, the solicitors of *Elizabeth Georgiana Harriet Harcourt*, discovered at *St. Leonard's Hill* and in the office of Messrs. *Forster* and *Frere*, the solicitors to the Earl and his executors, certain documents and papers which were considered to lead to the conclusion that the

1851.

HARCOURT

v.

SEYMOUR.

Bill in *Harcourt*
v. *Seymour*.

Earl *had elected to take the funds subject to the trusts of the settlement, as personal estate.*

In consequence of that discovery, the bill in *Harcourt v. Seymour*, the suit in which this case is intituled, was filed in June 1848, by the daughters of *William Bernard Harcourt*, against the parties to *Seymour v. Vernon*. It stated and charged, amongst other things, that *William Bernard Harcourt* executed the indentures of the 8th and 9th of May 1835, in ignorance of his rights as to the trust-funds and of very material facts bearing thereon which had been discovered since his decease; and that he had no knowledge of any facts beyond those contained in the cases laid before Counsel as aforesaid: That the 34,338*l.* 7*s.* 4*d.* was his absolute property, and, if that sum had been treated and dealt with as such, instead of his receiving it as the consideration for the conveyance made by him in May 1835, he would have continued the absolute owner of the estates comprised in that conveyance, and those estates would have descended to the Plaintiffs as his coheirs, and they were then entitled to have the same conveyed to them: That Earl *Harcourt* became absolutely entitled to the trust-funds by virtue of divers acts done and declarations made by him in his life-time, and that so the Countess always believed and considered: and, as evidence of the matters aforesaid, that the trust-funds were considered and treated, by him, as his own personal estate, previously to and at the dates and execution of his will and codicil and, thenceforth, until his death; and he corresponded with divers persons and treated the same as his own *personal* property in such correspondence; and also executed divers deeds, with reference to the mortgage for 20,000*l.*, having a similar purport or effect; and made divers entries, in his pass books or banking account

books with *G. S. Collyer* (who was his banker and agent as well as one of his executors and a trustee of the settlement) wherein he stated the trust-funds to be, "trust-money:" that the trust-funds were properly dealt with, *as personalty*, throughout the whole of the Countess's lifetime, and they ought always to have been, and would have been so dealt with, if *William Bernard Harcourt* and his advisers had been aware of his real rights and interests and of the facts, documents and circumstances referred to in the bill:* that *George Simon Harcourt*, *G. C. Heath* and *G. S. Collyer* (the Countess's executors), ought to have taken proceedings in respect of the matters thereby complained of, but they had declined so to do; and that *Elizabeth Georgiana Harriet Harcourt* (the mother of the Plaintiffs) had declined to join as a co-plaintiff with them.

1851.
HARCOURT
v.
SEYMOUR.

The bill prayed that it might be declared that *Earl Harcourt* elected and intended to treat and take and did treat and take the trust-funds, comprised in the articles of settlement of the 21st of September 1778, *as personalty*; and that the Countess became absolutely entitled thereto as his residuary legatee; and that *William Bernard Harcourt*, as claiming through her and as such legatee and residuary legatee as in the bill and hereinbefore mentioned, was, under the circumstances therein mentioned, in like manner, absolutely entitled thereto; and that it might be also declared that he executed the indentures of the 8th and 9th of May 1835, in error and mistake, and in ignorance of his real rights and interests with reference to the trust-funds; and that those indentures were void: and

* These facts, documents and circumstances are stated in the *Master's* report, *post*, page 24 *et seq.*

1851.
 HARCOURT
 v.
 SEYMOUR.

that *Seymour* and *Heath* (the surviving trustees of the Earl's will) might be decreed to convey the estates comprised in those indentures, to the Plaintiffs, subject to such right of dower (if any) as *Elizabeth Georgiana Harriet Harcourt* might be considered entitled to: and that an account might be taken of the rents of the same estates received by *Seymour* and *Heath*, and that the same might be secured for the benefit of the Plaintiffs: or that the 34,338*l.* 7*s.* 4*d.* and interest thereon might be made good, to the Plaintiffs, by sale of the estates, or, otherwise, out of the Earl's assets, or in such other manner as, to the Court, might seem meet.

16th November
 1848. Order
 for preliminary
 inquiries.

By an order dated the 16th November 1848, the *Master* was directed to inquire and state (amongst other things) how and in what manner and under what circumstances the sums of 2000*l.*, 5000*l.* and 25,000*l.*, making together the sum of 32,000*l.*, comprised in the settlement of the 21st of September 1778, were dealt with and invested, from the date of such settlement, up to the time of the Earl's death; and how and in what manner and under what circumstances the same had been dealt with and invested since the Earl's death.

10th April 1850.
 Report in pur-
 suance of that
 order.

On the 10th of April 1850, the *Master* made his report in obedience to that order,* and thereby, after finding the facts contained in the statement of this case, found the following matters, all of which he stated to have been ascertained after the bill in *Seymour v. Ver-*

* The documents comprised in this report, were much relied upon both in the argument and in the judgment; and, therefore, the reporter thought it advisable not merely to state the substance of them (which could not be done satisfactorily) but to set them forth.

non was filed: That Earl *Harcourt* made entries in his pass books or banking account books with *G. S. Collyer*, wherein he stated the trust-funds to be, "trust-money," and, "trust-stock;" and wrote against several of the entries therein of dividends received on the trust-funds in 1812, 1822 and four following years, "Interest of trust-money :—" That various arrangements were come to with reference to the mortgage for 20,000*l.* and the interest thereof (which originally was 5*l.* *per cent.*) between Sir *George Lee* and the Earl, and, subsequently, between the Earl and *John Lee*, who succeeded to Sir *George's* mortgaged estates: and that a deed dated the 19th of February 1828, and expressed to be made between *Danby*, Sir *Howard Douglas* and *Collyer* of the first part, *John Lee* of the second part and the Earl of the third part, and which was executed by *Collyer*, *John Lee* and the Earl, after reciting the mortgage for 20,000*l.*, and showing that it was vested in *W. Danby*, Sir *H. Douglas* and *Collyer*, proceeded in part as follows: "And whereas the said sum of 20,000*l.* was not the proper monies of the said *William Danby*, Sir *H. Douglas* and *George Samuel Collyer*, but was held by them upon the trusts expressed and declared, concerning the same, in and by a certain indenture of settlement executed previous to the marriage of the said Earl *Harcourt* with his present Countess, under and by virtue of which, the said Earl is entitled to the interest of the said sum of 20,000*l.* during his life, and the said Countess is afterwards entitled to the interest thereof during her life * and, in the event of the said Earl dying without issue, he is entitled to the absolute property in the said principal money: And whereas it has been agreed, between the said Earl and the said *John Lee*, but without prejudice as

1851.
HARCOURT
v.
SEYMOUR.

Deed of the
19th February
1828.

* This recital was erroneous.

1851.
 {
 HARCOURT
 v.
 SEYMOUR.

hereinafter mentioned, that the said sum of 20,000*l.* shall remain vested, upon the security of the said manors and other hereditaments, for the term of five years from the 27th day of September 1827, at the rate of 4*l.* 10*s.* *per centum per annum*, under and subject to the provisoes and conditions hereinafter expressed and declared : Now these presents witness, and it is hereby agreed and declared, between and by the parties hereto, and the said *John Lee* doth hereby, for himself, his heirs, executors and administrators, covenant with the said Earl, *his executors, administrators* and assigns, that he, the said *John Lee*, his heirs, executors or administrators, shall not be at liberty to pay the said sum of 20,000*l.* or any part thereof, until the end of five years to be computed from the said 27th day of September last past, unless the said Earl, *his executors, administrators or assigns*, shall call in the same in consequence of default being made in payment of the interest of the said sum of 20,000*l.* : And it is hereby agreed and declared, between and by the parties hereto, and particularly the said Earl doth hereby, for himself, his heirs, executors, administrators and assigns, covenant with the said *John Lee*, his heirs and assigns that, in case the said *John Lee*, his heirs or assigns, shall pay to the said Earl, *his executors, administrators* and assigns, interest for the said sum of 20,000*l.* after the rate of 4*l.* 10*s.* *per centum per annum*, by equal payments, on the 27th day of March and 27th day of September in every year during the said term of five years, he, the said Earl, *his executors, administrators* and assigns, *or the said William Danby, Sir H. Douglas and G. S. Collyer*, or any of them, their or any of their heirs or assigns, shall not nor will call in the said sum of 20,000*l.* or any part thereof, until the end of the said term of five years : But it is hereby agreed and declared, between and by the parties to these presents, that if, at

any time during the said term of five years, default shall be made, by the said *John Lee*, his heirs or assigns, in payment of the interest of the said sum of 20,000*l.*, it shall be lawful, to and for the said Earl *Harcourt*, *his executors, administrators* or assigns, and *for his or their trustees*, to call in and compel payment of the said sum of 20,000*l.* and the interest thereof then in arrear and thereafter to accrue due, at the rate of 5*l. per cent. per annum.*"

1851.
HARCOURT
v.
SEYMOUR.

The *Master* found that the last-mentioned deed was binding on the Earl from the date of its execution and was regularly acted on, and that the Earl had treated the mortgage-money *as money*, previously to the date of the deed; and that there was found, at *St. Leonard's*, a letter with the following endorsement in the handwriting of the Earl:—"4th October 1827, Mr. *Rose*,* respecting my mortgage upon Sir *George Lee's* estate."

The *Master* next set forth the following document, 12th October 1823. The whole of which was in the Earl's handwriting and was endorsed by him: "Statement of *my* property, 12th October 1823: " The Earl's statement of his personal property.

"Supposed amount of *my* property, 12th October 1823.

£	s.	d.		£	s.	d.
42,688	1	1	Three per Cents. 83	35,431	0	0
13,371	18	6	Four per Cents. 103	13,772	0	0
1,162	11	4	Ditto Ditto	1,196	0	0
4,032	3	9	Three per Cents. do.	3,346	0	0
1,000	0	0	India Stock	1,850	0	0
3,018	17	4	Four per Cents.	3,108	0	0
				<hr/>		
				£58,703	0	0

* Mr. *Rose* was Sir *George Lee's* solicitor.

1851.		£	s.	d.
HARCOURT v. SEYMOUR.	Mortgage upon Sir <i>George Lee</i> . . .	20,000	0	0
	30 Shares Gas Light	1,500	0	0
	House, <i>Portland Place</i>	5,000	0	0
	To arrears of Rent from several Tenants to Michaelmas last	4,114	19	2
	To be received by my executors within six months after my decease from the person who comes into possession of the House &c. <i>Nuneham</i> , and <i>Harcourt</i> House, being the value of Stock and crop and plate in 1809	6,883	0	9

N.B. Whether in case the stock and crop
at my decease should be worth more
than 369*l.* 3*s.* 2*d.* my executors have
not a fair claim for the difference.

City Bonds purchased June 1822 . . .	20,000	0	0
Russian Stock, valued at	1,700	0	0
	<hr/> £117,900 19 11"		

The *Master* then found that the two items of 13,371*l.* 18*s.* 6*d.* Four *per Cents*, and mortgage upon Sir *George Lee*, 20,000*l.* contained in that statement, represented the stock and mortgage whereof the trust premises consisted: and that, in many of the letters and documents which had been discovered, there were repeated references, in the handwriting of the Earl, to the trust-funds, as being "trust-money;" and that, among certain correspondence which had been found and produced by *Collyer*, were references of a similar nature; and, amongst other things, there was the following letter, from the Earl to *Collyer*, dated the 3rd March, 1822: "I have not yet come to a final deter-

The Earl's cor-
respondence
with *Collyer* and
Frere.

* The Five *per Cents*. remained unconverted at the date of this letter.

mination respecting *my Five per Cent. stock* ;* but I feel inclined to accept of the offer of Government, in which case I conclude, it will not be necessary for me to go to London ;” and another letter from the Earl to *Collyer*, dated 14th March 1822, containing this passage : “ Upon reverting to my stock account, I find *that I have* in the *Five per Cents.* 19,720*l.* 7*s.* 8*d.* ; *trust-money* ditto, 12,735*l.* 3*s.* 4*d.*” And in a postscript of a letter from the Earl to *Collyer*, dated the 22nd October 1822, there was this passage : “ If I understand this matter, the interest of the 12,735*l.* 3*s.* 4*d.* *trust-money* and the 1107*l.* 4*s.* 2*d.* was received to 6th July, when these two sums were vested in the New *Four per Cents.* Query whether it would not be expedient to transfer them into the *Three per Cents.*, as well as the 3018*l.* 17*s.* 4*d.* now in the Old *Four per Cents.* In short, *I feel the situation of landed property to be so much worse than persons in London are aware of*, that I see a strong inclination in the public and, particularly, in Opposition, to throw a part of the burthen upon the fundholders. Under this impression, therefore, I look to the *Three per Cents.* as the only stock that can be considered as exempt from any financial operation, and consequently secure.” The *Master* then found as follows : That the Earl wrote a letter, to *Collyer*, dated 2nd December 1822, which was partly as follows : “ *It is fortunate for me that I have other resources besides landed property*, for I am sorry to say I hear nothing but complaints from the farmers, although the rents of some of my tenants have been reduced above 30*l. per cent.* within the last four years :” That the Earl wrote a letter, to *Collyer*, dated the 14th February 1824, in the following words : “ As I have a good reason to believe that it is a part of the Chancellor of Exchequer’s plan of finance to reduce the *Four-and-a-half per Cents* to *Three*, or, at least, to *Three-and-a-half per Cents*, I very much wish you, without loss of time, to consult, with your adviser in money matters, whether it might not be expedi-

1851.
 HARCOURT
 v.
 SEYMOUR.

1851.

HARCOURT
v.
SEYMOUR.

ent to sell out the whole or a part of the 14,534*l.* 9*s.* 10*d.* now in that stock, and vest it in any other fund, or, if judged safe, in any of the foreign funds: I have written, to my friend *Willimott*, and have desired him to inform you whether any more of the *City* bonds were to be disposed of, in which case I should wish to lay out a part of the money in preference to any other mode whatever: "That the sum of 14,534*l.* 9*s.* 10*d.* mentioned in the last-mentioned letter, comprehended the sum of 13,371*l.* 18*s.* 6*d.* New Four *per Cents*, part of the trust-funds comprised in the settlement: That the Earl wrote a letter, to *Collyer*, dated the 2nd March 1824, part of which was as follows: "Although I have not acknowledged your letter of the 16th February as soon as I should have done, I must beg you will believe I do not feel the less obliged to you for the information you have procured for me respecting the future application of *my* Four *per Cent* stock: in consequence of which and of the information I have received from other quarters upon this subject, I have made up my mind to accept of Mr. *Robinson's* proposal as far as *my private property*, viz. 1162*l.* 11*s.* 4*d.*, is concerned; reserving to myself the vesting it in *City* bonds whenever an opportunity may offer. If I do not misunderstand the business, the old Four *per Cents* 3018*l.* 17*s.* 4*d.* remain in their present situation and are not affected by this new financial operation, but you best know whether it will be necessary for me to give or procure, from Mr. Danby, the surviving trustee, a consent to the removal of the Three to the Three-and-a-half *per Cents*, 13,371*l.* 18*s.* 6*d.*, trust-money,* and have the goodness to inform me how to act accordingly: "That the Earl wrote, to *Collyer*, a letter dated the 13th March 1824, which contained the following passage: "*I conclude it will be necessary for me to have the consent of my trustees, viz., Mr. Danby, Sir H. Calvert and Sir Howard Douglas, to the transfer of the 13,371*l.* 18*s.* 6*d.**

* *Sic.*

trust-money in the Four, to the Three-and-a-half *per Cents*; for which you will have the goodness to transmit the authority in due time:” That the Earl wrote to *Collyer*, a letter dated the 17th March 1824, part of which was as follows: “I have received your letter of the 15th instant, by which I perceive I have mistaken respecting the 13,371*l.* 18*s.* 6*d.* stock in the Four *per Cents.*, which, you very justly observe, had better remain as at present vested:” That the Earl wrote a letter to *Collyer*, dated the 2nd of October 1827, inquiring whether the deeds relating to the mortgage for 20,000*l.* which he called *his* mortgage-deeds, were in *Collyer’s* house, or at his bankers’, or at Messrs. *Coutts’s*, and adding *that they were his only security for the 20,000*l.* advanced by him:*” That the Earl wrote two letters to Mr. *Frere*, dated the 27th of May 1828 and the 18th of January 1830, the former of which contained as follows: “I have to acknowledge your letter of the 23rd inst., with the draft of the codicil, which, I conclude, will answer the purpose; and I have executed it accordingly, trusting that no doubt will arise upon the intentions of the testator as expressed in the two documents:” and the latter of which contained as follows: “Having received the enclosed letter from Mr. *Collyer*, conveying a proposal, from Mr. *Lee’s* agent, for the reduction of the interest *on my mortgage*, to four *per cent.*: *I shall be much obliged to you for your opinion upon the expediency of accepting that proposal; and, also, if the mortgage is to be paid off, whether I have not a right to twelve months’ notice of the mortgage being called in.* Enclosed, you have a notice, from the *Oxford Canal* proprietors, respecting a further loan of about 80,000*l.* upon which I wish also to receive your opinion *as to laying out the whole or a part of the money in question.*”

1851.
HARCOURT
v.
SEYMOUR.

1851.
 HARCOURT
 v.
 SEYMOUR.

The *Master* also found that, on the 2nd of March 1828, the Earl wrote a letter, to *Collyer*, which contained as follows: "As my property has increased since the date of my will, I am desirous to ascertain the present value of *my* funded property; and I shall, accordingly, beg of you to give me a memorandum of it:" and that, on the 3rd of March 1828, *Collyer* wrote, in answer, as follows: "I will thank your Lordship to name an early day that you may sign my ledger and take up your vouchers. On that day, I shall present you with a valuation of your funded property:" That, on the 6th of March 1828, *Collyer* received a letter, from the Earl, stating that he was unable to leave his place of residence, in consequence of the illness of the Countess, until the end of that week or the beginning of the next, and ending with the following passage: "I shall be glad of a line to inform me of the value of *my funded property*:" and that, on the same day, *Collyer* wrote the following answer: "I am honoured with yours of the 5th inst., and beg to transmit your Lordship the enclosed statement of your funded property. I have sent your account-books by the *Windsor* stage this day:" That the last-mentioned letter contained the following statement:—

MONEY.

£ s. d.

6th March 1828. Statement of the Earl's funded property, made out by Mr. <i>Collyer</i> .	"In the name of Lord <i>Harcourt</i> , Three per Cent. Consols, 70,481 <i>l.</i> 14 <i>s.</i> 2 <i>d.</i> ; supposed value at 84 . . . 59,204 0 0 <i>In the names of trustees marriage settlement</i> , 13,371 <i>l.</i> 18 <i>s.</i> 6 <i>d.</i> New Four per Cents; supposed value at 100 . 13,371 18 6 <i>In the name of Earl Harcourt</i> , New Four per Cents, 1162 <i>l.</i> 11 <i>s.</i> 4 <i>d.</i> . 1,162 11 4
---	--

	£	s.	d.	1851.
In the name of Earl <i>Harcourt</i> , Three and-a-half per Cents, late Four per Cents, 301 <i>l.</i> 17 <i>s.</i> 4 <i>d.</i> ; supposed value at 82	2,777	0	0	HARCOURT v. SEYMOUR.
<i>India</i> stock in the name of Earl <i>Harcourt</i> , 1000 <i>l.</i> ; supposed value at 244	2,440	0	0	
	<hr/> £78,955 9 10 <hr/>			

“N. B.—When a great part of a person’s property is in the funds, it is better to leave, to the parties, so much stock, and not money, as the stocks are ever fluctuating; and, should ever the times become serious, they might fall below 60.”

The *Master* also found that, on the 7th May 1828, the Earl wrote, to *Collyer*, as follows: “I send you, enclosed, a letter just received, from my friend, Mr. *Willimott*, respecting a post-office bond to be disposed of; in answer to which I have told him that I should leave it to you to determine whether it will suit the state of my finances to become a purchaser at, I conclude, an advanced price, as upon a former occasion; in which case, if you do not see very strong arguments against this measure, the purchase-money might be provided by applying a part of my credit, after leaving about 4000*l.* balance in your hands, and making up the remainder of the purchase-money from any of the items of my funded property, *trust-money excepted*. I have only to add that the money to complete my late purchase of land, viz. about 1500*l.* will be called for in about two months, and, on the other hand, I shall have to receive, immediately, the half-year’s rent of *Harcourt House*.”

1851.

HARCOURT
v.

SEYMOUR.

23rd January
1829. State-
ment of the
Earl's funded
property.

And the *Master* found that the following statement, dated the 23rd of January 1829, was found at *St. Leonard's* :

"THE COMPUTED PRESENT VALUE OF EARL HARCOURT'S
PROPERTY IN THE FUNDS, &C.

Description.	Amount of Stock.	Price per Cent.	Value.	
	£ s. d.	£	£ s. d.	
Three per Cent. Consols.	79,790 18 6	86	68,619 0 0	
New Four per Cents.	1,162 11 4	101	1,173 0 0	
Ditto	13,371 18 6	101	13,504 0 0	<i>Marriage Settle- ment.</i>
Three - and - a - half per Cents, late Old Four per Cents.	3,013 17 4	96	2,897 0 0	<i>Vide Messrs.</i>
East India Stock . . .	1,000 0 0	238	2,380 0 0	<i>Coutts's Memor- andum herewith.</i>
Russia Stock			1,908 12 8	
City Bonds	30,000 0 0		30,000 0 0	
Gas-light Shares . . .	2,400 0 0		2,400 0 0	
			122,881 12 8	
Irish Tontine			1,102 1 8"	

And that the said statement was endorsed : "The computed present value of Earl *Harcourt's* funded property, 23rd January 1829 ;" and that it was prepared by *Collyer*, by the direction and for the use of the Earl, and was, accordingly, in or about January 1829, sent, by *Collyer*, to the Earl. The *Master* also found that the Earl wrote a letter to *Collyer*, dated the 14th January 1830, which contained the following passage : "I am not by any means disposed to agree to Mr. *Lee's* proposal ; although I will not give him a definitive answer until I have an opportunity of consulting Mr. *Frere* upon the subject. You are, however, at liberty to tell his agent that, considering the circumstances of the loan, and, particularly, that, at the period I consented to receive four-and-a-half *per cent.*, when the usual interest was five *per cent.*,"* I cannot but be astonished at such a proposition, and that, at any rate, I conceive I

* *Sic.*

have a right to a twelvemonth's notice. You are aware also that I have an offer of four *per cent.* upon the *Oxford* canal, payable to a day, and with an augmentation of one-half *per cent.*, in the event of the reduction of the Three *per Cents* to eighty."

1851.
HARCOURT
v.
SEYMOUR.

The *Master* also found that the existence of the deed of the 19th of February 1828, and the said statements of property and the aforesaid correspondence between the Earl and *Collyer* and *Frere*, were not known to *William Bernard Harcourt* or his advisers, nor was he ever aware of any such deed having been executed or correspondence having taken place.

On the Cause coming on to be heard,

Argument for
Plaintiffs.

Mr. *Bethell*, for the Plaintiffs, said :

The bill is filed by the next-of-kin of *W. B. Harcourt*, who derive their title under the will of *Mary* late Countess *Harcourt*, the widow of *William* late Earl *Harcourt* and the residuary legatee under his will. The main proposition which I have to support, is that the 32,000*l.*, the amount of the 5000*l.*, 2000*l.*, and 25,000*l.*, comprised in the settlement on the marriage of the Earl and Countess, or the funds that represented that sum at the Earl's death, passed, by his will, to the Countess, as part of his personal estate. The other proposition is that the deed executed by *W. B. Harcourt* in 1835, and which lies in the way of the relief sought by the Plaintiffs, was prepared and executed under a general misapprehension and in ignorance of material facts determining the nature of the Earl's interest, and, consequently, the operation of his will ; and, therefore, that that deed ought to be set aside. Assuming that the

1851.
 HARCOURT
 v.
 SEYMOUR.

32,000*l.* was converted into real estate by the settlement, I submit that the Earl was perfectly competent to discharge it, and that the facts of this case are abundantly sufficient to show that he did discharge it of its artificial character or quality. It is true that there was an interest in the Countess, which was interposed between the limitation to the Earl for life, and the limitation to his right heirs; but the Earl became a purchaser of that interest, by making a provision in satisfaction of it, by his will, which the Countess accepted: and, if he had not become a purchaser of it, it would have made no difference; for it was only an interest by way of charge. The next question is whether the Earl did any act which showed that he intended to discharge the property of its artificial character, and to leave it impressed with its original character: and I submit that the slightest act, the slightest evidence of intention is sufficient for that purpose. The rule, upon that subject, is very correctly laid down in a Treatise on the Equitable Doctrine of Conversion, by Leigh and Dalzell, page 170: "The slightest expression by those absolutely entitled to the property, denoting a change as to its quality, will be quite sufficient." Here we have an abundance of instances in which the owner of the fund in question, spoke of it, treated it and dealt with it as personal property, in his letters, in his banker's pass-books, and in statements of his property: *Chichester v. Bickerstaff* (a), *Pulteney v. Lord Darlington* (b), and *Stead v. Newdigate* (c). I cite this last case, not for the decision in it, but to show, from the expressions of Sir William Grant, that if this case had come before him, he would have held that the primitive character of

(a) 2 Vern. 295.

7 Bro. P. C. 530.

(b) 1 Bro. C. C. 223; and

(c) 2 Mer. 521.

the fund, was restored. Sir *William Grant* says, in page 531, that the period for the sale of the estate, did not arrive in the husband's lifetime, and that his wife might have insisted on a sale. But, in this case, the period for investing the fund in land, did arrive in the Earl's lifetime, and the Countess could not have insisted on its being invested; for her interest was purely pecuniary. Besides, the Earl had, in fact, become the absolute owner of the fund, subject to the interest of the Countess; for, when he made his will, he had been married fifty years to the Countess without having had a child by her; and, therefore, there was then no probability, indeed I might say, possibility, of his having a child by her. Another ground on which Sir *William Grant* relied, was that the will, in the case before him, not only did not show any intention to divest the property of its artificial character, but showed an intention to the contrary. Whereas, in this case, the Earl satisfied the interest provided for the Countess by the settlement, in order to give effect to the bequest, made by him, of the 80,000*l.*, which could not have had effect given to it, except by attributing the 32,000*l.* to it. Therefore, the will, instead of showing an intention that the settlement should be carried into effect, shows an intention to defeat its operation: and, consequently, the will alone, would have been sufficient to restore the fund to its natural character. Again, the trustees of the settlement, instead of investing the fund in land, laid out a very large portion of it on mortgage; and, in February 1828, they were parties to a deed which contained a covenant, by *John Lee*, the owner of the equity of the redemption, with the Earl, *his executors, administrators and assigns*, that the money *should not be paid off for five years, unless the Earl his executors, administrators or assigns should call it in.* That deed too stipulates

1851.

HARCOURT

v.

SEYMOUR.

1851.
 ┌
 HARCOURT
 v.
 SEYMOUR.

that the interest shall be paid not only to the Earl during his life, but to his executors or administrators after his death. But, if the fund retained its artificial character, the interest would not be payable to his *executors or administrators*: *Lingen v. Souray* (d). This case is much stronger than that, for, there, it was held that the husband, by merely declaring the trust, of the 250*l*, for his executors, restored the fund to its pristine quality. Therefore, without resorting to the Earl's letters or the entries which he made in his pass books, or the statements of his personal property, which are set forth in the *Master's* report, there is amply sufficient to divest the fund of its artificial quality of land, and to restore it to its natural quality of money. I shall, however, make a few observations on those documents; but, before I do so, I will refer to two other authorities: *Triquet v. Thorton* (e), and *Cookson v. Cookson* (f).

Mr. *Bethell* next drew the attention of the Court to the *Master's* report, and relied on the entries made, by the Earl, in his pass-books, and on the statements of his personal property and the letters written by him, and particularly those dated the 3rd of March 1822, the 22nd October 1822, the 17th March 1824, and the 2nd of March 1828, as showing that he considered the funds representing the 32,000*l.*, as part of his personal estate, and as property which the trustees of the settlement had no longer any right to interfere with.

He concluded by reading the cases laid before

(d) 1 P. W. 172, see 176. (f) 12 Cl. & Finn. 125;
 (e) 13 Ves. 345. This and 5 Beav. 22, *nom. Cook-*
 case and the next were read *son v. Reay*.
 at great length.

Counsel in 1834, in order to show that they did not mention the deed of February 1828 or any of the other matters contained in the *Master's* report; and, consequently, that the opinions on those cases, were given in ignorance of most material circumstances: and, he submitted that, as the conveyance of May 1835, was made on the faith of those opinions, it ought to be set aside.

1851.
HARCOURT
v.
SEYMOUR.

Mr. *Giffard*, who was with Mr. *Bethell*, said that no part of the 32,000*l.* was paid to the trustees of the settlement, until 1808; at which time, as the Earl and Countess had been married thirty years without having had a child, it was almost certain that they never would have one: that the trustees invested the whole of that sum, except the 1000*l.* which was paid to the Earl, either in the funds or on mortgage, although there was no trust, in the settlement, to invest any part of it in anything but land: that *Wheldale v. Partridge* (g) tended to show that the quality of land was not definitively fixed, upon the 32,000*l.*, by the settlement, and, if it was, that it might be contended that the bequest of the 80,000*l.* in the Earl's will, was a satisfaction of the obligation to invest the 32,000*l.* in land: but that it was not necessary to argue in support of those propositions, as the following authorities were abundantly sufficient to show that the Earl had elected to take the 32,000*l.* as personalty: *Chaplin v. Horner* (h), *Edwards v. Countess of Warwick* (i), *Pulteney v. Lord Darlington* (k), *Crabtree v. Bramble* (l), *Chaloner v. Butcher* (m), *Curling v.*

(g) 5 Ves. 388, and 8 Ves. 227, see 236.

(h) 1 P. W. 483.

(i) 2 P. W. 171.

(k) 1 Bro. C. C. 223.

(l) 3 Atk. 680.

(m) *Ibid.* 686, cited.

1851.
 HARCOURT
 v.
 SEYMOUR.

May (n), Chichester v. Bickerstaff (o), Bowes v. Lord Shrewsbury (p), Walker v. Denne (q), Bradish v. Gee (r), Inwood v. Twyne (s), Kirkman v. Miles (t), Triquet v. Thornton (u), Van v. Barnett (v), Bayley v. Boulcott (w), Ashby v. Palmer (x), Davies v. Ashford (y) and Cookson v. Cookson (z).

Mr. *Stuart* and Mr. *G. S. Law* appeared for *Seymour* and *Heath*, the surviving trustees of Earl *Harcourt's* will.

Mr. *Calvert* appeared for *Elizabeth Georgiana Harriet Harcourt*, the mother of the Plaintiffs.

Argument for
 Defendants.

Mr. *Rolt*, for *George D. T. B. Harcourt* and his sons, the first tenant for life and tenants in tail male under the Earl's will, said :

George D. T. B. Harcourt acquiesces in the view taken of this case by Mr. *Bethell* and Mr. *Giffard* ; but it is my duty, as Counsel for his sons who are infants, to contend that the 32,000*l.* was converted into real estate by the settlement, and that it passed, as such, by the will of Earl *Harcourt*. Where personalty stamped with the character of land, is claimed as personalty, it is not sufficient to show that the person absolutely entitled to it, supposed it to be personalty. There must be evidence which leaves no doubt, on the mind of the Court, that

(n) 3 Atk. 255, cited.

(o) 2 Vern. 295.

(p) 5 Bro. P. C. 144.

(q) 2 Ves. 170.

(r) Amb. 229.

(s) 2 Eden, 148.

(t) 13 Ves. 338.

(u) 13 Ves. 345.

(v) 19 Ves. 102.

(w) 4 Russ. 345.

(x) 1 Mer. 296.

(y) 15 Sim. 42.

(z) 5 Beav. 22, and 12 Cl. & Fin. 125.

he knew that there was a trust which stamped it with the character of real estate, and, knowing that fact, that he did something which clearly showed it to be his intention to defeat the trust, and to take the fund as it stood. How can you impute to him an intention to reconvert the fund, unless you first show that he knew that it had been converted? His speaking of it in its actual condition, is nothing more than a description of it. You must show that he knew of the existence of the trust, and that he did some act which showed his determination that the trust should not take effect.

1851.
HARCOURT
v.
SEYMOUR.

The Vice-Chancellor.—The Counsel for the Plaintiffs say that it is sufficient to show that he dealt with the fund as personalty.

Argument resumed.—The dealing with the fund must be such as to show an intention to *change* the character impressed upon it: simply dealing with it as personalty, is not sufficient.

Such being, as I submit, the principle of the cases on the subject of conversion, I proceed to observe upon the peculiar circumstances of this case, as they appear on the *Master's* report; and which, I submit, show that Earl *Harcourt* did not intend to defeat the trust for conversion contained in the settlement.

The *Master* finds that 1000*l.* of the 32,000*l.*, was received by Earl *Harcourt*; that 11,000*l.* was laid out in the purchase of 12,735*l.* 3*s.* 4*d.* Navy Five *per Cents* in the name of *William Danby*, the only trustee of the settlement who was then living, and that the remaining 20,000*l.* was invested on a mortgage of Sir *George Lee's* estates, made to *Danby* in fee.

1851.
 HARDCOURT
 v.
 SEYMOUR.

Then, in 1813, Earl *Harcourt*, who had then been married thirty-five years without having a child, covenanted to indemnify *Danby* against any loss or damage which he might sustain by reason of any laches which might be imputed to him, in consequence of the trust-fund having been invested as before mentioned, *instead of the same having been invested in the purchase of real estate, as directed by the settlement*, or in consequence of *Danby* having acquiesced in the *misapplication* of the 1000*l.* by the Earl. This is strong evidence that, up to 1813, it was the Earl's intention to treat the settlement-fund as real estate.

Then, by a deed dated in April 1818 and executed by the Earl and Countess, they join with *Danby* in appointing new trustees of the settlement; and it was thereby agreed and declared that *Danby* and the new trustees should stand possessed of the 12,735*l.* 3*s.* 4*d.* Navy Five *per Cents*, which, shortly before, had been transferred into their names, and of the 20,000*l.* secured on mortgage, when the same should be conveyed to them, upon *the trusts of the settlement*. So that the Earl, in 1818, when he had been married forty years, and when it was quite clear that there would be no issue of the marriage, treated the funds as subject to be laid out in real estate.

In 1822, the 12,735*l.* 3*s.* 4*d.* Navy Five *per Cents* was converted into 13,371*l.* 18*s.* 6*d.* New Four *per Cents* The Earl never repaid the 1000*l.*; and the 20,000*l.* and the 13,371*l.* 18*s.* 6*d.* New Four *per Cents*, remained secured and invested as before mentioned, until after the Earl's death. In March 1828, the Earl made his will; but it does not contain anything which affects the present question; nor is the mode in which the trust-funds

were considered and dealt with after the Earl's death, of any importance.

1851.
HARCOURT
v.
SEYMOUR.

Then the *Master* states that, from some time in the year 1812 down to the 10th of February 1826, the Earl made entries in his pass-books, in which he termed the sums of Five *per cent.* and Four *per cent.* stock, sometimes "*trust-money*," and sometimes "*trust-stock*." Now, he had distinctly recognized the trusts of the settlement as existing in 1818: and, as no new trust had been declared between that year and 1826, he must have referred to the trusts declared by the settlement, when he used the expressions, "*trust-money*," and "*trust-stock*."

I now come to the deed of the 19th of February 1828, on which the Counsel for the Plaintiffs have so much relied. That deed recites that the 20,000*l.* was not the proper monies of *W. Danby*, Sir *H. Douglas* and *G. S. Collyer*, but was held by them *upon the trusts of the settlement*, under which the Earl was entitled to the interest thereof for his life, and, in the event of his dying, without issue, to the absolute interest in the principal. That recital is perfectly correct; for the Earl was entitled to the absolute interest in the principal; and, for that reason, the expression, "his executors or administrators," is used throughout the deed. And it is to be observed that the trustees of the settlement are associated, with the Earl and his executors, administrators and assigns, as the parties by whom the money is to be called in; and, therefore, it recognizes the existence of the trusts of the settlement. Consequently, if it had stood alone, it would not, at all, assist the case of the Plaintiffs. Besides I shall show from other documents set forth in the report, that, subsequently to the date of that deed, the Earl recognized the trusts of the settlement as existing trusts.

1851.
HARCOURT
v.
SKYMOUR.

The *Master* then sets forth certain letters and statements of property in which the Earl speaks of the mortgage and the stock, as his property. But those expressions are quite as consistent with my case as they are with the case of the Plaintiffs. The question, is not whether the 20,000*l.* and the stock were the Earl's property, but whether they were real or personal estate. Besides, in those documents, he speaks of the stock as "*trust-money*:" he distinguishes it from his private property; and asks advice as to the procuring of the consent of the trustees to its being converted into stock of a different denomination. Then, on the 6th of March 1828, which was subsequent to the date of the deed of the 19th of February 1828, Mr. *Collyer* received a letter from the Earl, in consequence of which he sent the Earl a statement of his funded property containing this item: "In the name of trustees, marriage settlement, 13,371*l.* 18*s.* 6*d.* New Four *per Cents*:" and, on the 7th of May 1828, the Earl wrote a letter, to Mr. *Collyer*, respecting the purchase of a Post-office bond, which contained the following passage: "If you do not see any very strong argument against this measure, the purchase-money might be provided by applying a part of my credit, after leaving about 4000*l.* balance in your hands, and making up the remainder of the purchase-money from any of the items of my funded property, *trust-money excepted*." That expression shows that the Earl meant to leave the money subject to the trusts of the settlement. Then the *Master* states that there was found, at *St. Leonard's*, a statement dated the 23rd of January 1829, which *Collyer* had prepared by the direction and for the use of the Earl, in which the words: "marriage settlement" were written against the 13,371*l.* 18*s.* 6*d.* New Four *per Cents*.

I submit, therefore, that the contents of the *Master's* report, not only do not show that the Earl intended to convert the settlement-funds into personalty, but that they negative that intention.

1851.
HARCOURT
v.
SEYMOUR.

Mr. *Leach*, who was with Mr. *Rolt*, cited 1 Jarman on Wills, 534, 535, *Lingen v. Sowray* (a), and *Guidot v. Guidot* (b).

Mr. *Selwyn* (Mr. *James Parker* was with him) appeared for *George Simon Harcourt* and his son, who also were tenants for life and in tail male under Earl *Harcourt's* will.

Mr. *Malins* and Mr. *Messiter* appeared for Lord *Vernon*, Earl *Harcourt's* heir.

Mr. *Hobhouse* appeared for *G. S. Collyer*, the surviving trustee of the settlement, and an executor of the Earl's will.

The VICE-CHANCELLOR, without hearing the reply, delivered the following judgment:

I take the law upon this case to be perfectly clear. Where, by a settlement, land has been agreed to be converted into money, or money to be converted into land, a character is imposed upon it, until somebody entitled to take it in either form, chooses to elect that, instead of its being converted into money or instead of its being converted into land, it shall remain in the form in which it is actually found. There can be no doubt that that is

Judgment.

(a) 1 P. W. 172; see 176.

(b) 3 Atk. 254.

1851.
HARCOURT
v.
SEYMOUR.

the law ; and the only question in each particular case, is whether there have been acts sufficient to enable the Court to say that the party has so determined.

I confess that, in this case, it seems to me that there is a superfluity of circumstances which show, perfectly clearly and incontrovertibly, that Lord *Harcourt* intended to take the funds which represented the 32,000*l.*, as money and not as land. It was argued, indeed, by Mr. *Rolt*, that there must be an intention strictly to convert ; that is to say, that, knowing that the money was impressed with the character of land, the party must say : “ I mean that it shall no longer be land, but it shall be in its actual form of money.” I do not, however, think that that is the correct view of the law. It is quite sufficient if the Court sees that the party means it to be taken in the state in which it actually is. Whether he did or did not know that, but for some election by him, it would be turned into land, is quite immaterial. If, being money, the party absolutely entitled, indicated that he wished to deal with it as money, and that it should be considered as money, whether he knew or did not know that, but for that wish, it would have gone as land, appears to me to be wholly immaterial.

There are several circumstances here ; but I shall advert to a few of them only ; because they seem to me to prove, irresistibly, that Lord *Harcourt* meant to deal with the fund in question, as money.

In the first place, I think the will itself affords a very strong argument, from this circumstance ; namely, that he directs 80,000*l.* to be laid out in the purchase of land ; that is, to be laid out by those persons whom he there

constitutes his trustees. If, having 32,000*l.* to be laid out in land by one set of trustees under one trust, he meant to give 80,000*l.* more to be laid out in land, it would be a very extraordinary thing if he did not allude to it in some way or other, and say: "In addition to the 32,000*l.*, I give 80,000*l.* more." It is scarcely possible to imagine that a party could intend that there should be two trusts, going on concurrently, to purchase different trust estates. It is entirely contrary to what persons wishing to increase the property and influence of their family, ordinarily do; they wish their property to be consolidated as much as possible. Therefore, that, of itself, affords, to my mind, almost irresistible evidence that Lord *Harcourt* could not but suppose that he was disposing of this 32,000*l.* just as he was disposing of the rest of his property. That, however, it may be said, is mere conjecture. To a certain extent it may be so; but, in cases of this sort, it is impossible to define the exact limits between conjecture and evidence.

There are, however, circumstances here, which, according to my view of the case, are evidence, in the strictest sense of the word. Nothing can be so strong to show that a party intends to take, as money, that which is invested with a *quasi* real character, as his saying so under his own hand; and Lord *Harcourt* has said so under his own hand. The *Master* finds that, in 1823, he made a statement or an estimate of his *personal* property. It is not, I observe, so headed by Lord *Harcourt* himself; it is headed, "Statement of my property." Now, I might say that, there having been no exception to the *Master's* finding, I am bound by that finding. But I should be sorry, on a question of this sort, to deal with the matter technically: and, therefore, if I saw that this was not a statement of personal estate, but

1851.
 HARCOURT
 v.
 SEYMOUR.

1851.
 ┌───────────┐
 HARCOURT
 v.
 SEYMOUR.

merely, as it purports to be, a statement of his property real and personal, I should direct some further inquiry as to what the *Master* meant by describing it as a statement of his personal estate. But the fact is that it alludes to personal estate only. The testator had a large real estate; namely, the *St. Leonard's Hill* estate, which was an old family estate, and which he disposes of by his will. When, therefore, he makes a statement of what is popularly called personal property, and calls it: "Statement of my property," and does not include that which is clearly real estate, I must understand that he means what the *Master* represents to be his meaning; that is to say, a statement of his *personal* property. Then, in doing that, he, in terms, includes, as part of that property, the 13,772*l.* as the value of the trust stock, and the 20,000*l.* secured on the mortgage. I take that as a statement, by the testator, that he meant to treat those two sums as his personal estate.

Then, that being so, the next act is one which seems to me to be incapable of explanation, except upon the hypothesis that he meant to deal with the 20,000*l.* as personal property. I allude to the deed of the 19th February 1828. That sum had more or less impressed upon it, under the original trust, the character of land; but with which, for all practical purposes, it was obvious, to the mind of Lord *Harcourt*, that he had a right to deal in any way; because he had a life interest in it; his wife had no life interest in it, but she had a charge upon it; and, ultimately, it was to come to Lord *Harcourt*. He had, therefore, a clear right, if he chose, to treat that as a personal estate instead of land. He had the means of providing amply for his wife, and meant to provide, and he did provide amply for her. Therefore, practically,

not as a lawyer but as a man of the world, he would consider that he had a right to deal with this sum just as he did with the rest of his property.

1851.
HARCOURT
v.
SEYMOUR.

Looking, then, at this deed, with that as our guide, let us see what it states. The deed states that, by virtue of the settlement, the Earl was entitled to the interest of the 20,000*l.* during his life, and that the Countess was, afterwards, entitled to the interest thereof during her life (that is a mistake), and, in the event of the Earl dying without issue, that he was entitled to the absolute property in the said "principal money." That is not, by any means, a conclusive circumstance; but it is a circumstance relied upon, by Sir *William Grant*, in *Triquet v. Thorton*, in which he adverts to the fact that the testator described the property as stock, not as land. Then the deed proceeds thus: "And whereas it has been agreed that the said sum of 20,000*l.* shall remain vested upon the security of the said manors and hereditaments for the term of five years from the 27th September 1827, at the rate of 4*l.* 10*s.* per cent. per annum, under and subject to the provisoes and conditions herein-after expressed and declared: Now these presents witness, and it is hereby agreed and declared between and by the said parties hereto, and the said *John Lee* doth hereby, for himself his heirs, executors, administrators and assigns, covenant, with the said Earl *Harcourt*, his executors, administrators and assigns, that he the said *John Lee*, his heirs, executors or administrators or any person for the time being entitled, in equity, to redeem the said mortgaged premises, and claiming to be so entitled under him the said *John Lee*, shall not be at liberty to pay the said principal sum of 20,000*l.* until the end of five years to be computed from the said 27th September now last past, unless the said Earl *Harcourt*,

1851.
HARCOURT
v.
SEYMOUR.

his executors, administrators or assigns, shall call in the same." When you observe that, a few years before, the Earl had done that which, in terms, amounts to a declaration that he treated this sum as part of his personal estate, and that he afterwards covenants that it shall not be called in under five years, unless with the consent of him, his executors and administrators, it appears to me that the evidence in this case, is, beyond all comparison, stronger than it was in any of those cases of which so long a list was cited by Mr. *Giffard*, and that it puts the question beyond all possible controversy. There are other expressions in the deed, all leading to the same result.

Finding, then, these two important facts, I do not think it necessary to advert, minutely, to the expressions which are used in the letters subsequently set forth in the *Master's* report. On the one side, reliance was placed upon the expression, "trust stock," as showing that the Earl treated it as personalty. On the other side, that expression was relied upon as showing that he treated it as being still impressed with the character of real estate under the trusts of the settlement. The only observation I shall make upon that expression, is that the most I can say, in favour of the one side or the other, is that it is an equivocal one; and if that had been all, I should have felt it exceedingly difficult to rely upon it as indicating, conclusively, that the Earl meant to treat the stock as personal estate. However, every one of the letters is as consistent, at the least, with the supposition that he meant both the stock and the mortgage-money to form part of his personal estate, as it is with the supposition that he meant them to remain impressed with the character imposed upon them by the settlement. But all that is necessary to

be said upon those letters, is that they may be dismissed from consideration: and, if they are dismissed, there is this strong fact; that the Earl treated both the stock and the mortgage-money as part of his personal estate (which he had a right to do) and that he afterwards dealt with the mortgage-money, which was more than two-thirds of the total amount, in a way utterly inconsistent with the notion of his not having intended to deal with it as his personal estate.

1851.
 HARCOURT
 v.
 SEYMOUR.

The evidence, however, does not rest here. His banker, by his desire, made out and sent to him two statements of *his* funded property: (one just previous to the date of his will, and the other afterwards) in both of which the stock in which part of the 32,000*l* had been invested, was included; but distinguished, I admit, from the other stock mentioned in that statement. The Earl kept both those statements among his papers, as papers on which he was to act; and there is not the least allusion to the stock in question as being property which was to be dealt with differently from the other stock.

Finding then that the Earl included both the stock and the mortgage-money in a statement, made out by himself, of his personal property in the year 1823; finding that he afterwards dealt with the mortgage-money, (which was more than two-thirds of the settled property) as personal property, and stipulated that it should not be paid off for five years; and finding that he made a will, in which he not only indicates no contrary intention, but disposes of his property in a way in which, I think, no man would have disposed of it, if he had meant the fund thereby created to be invested in land independently of the 32,000*l*., I come, irresistibly, to the conclusion that he has given cogent and complete evidence that he

1851.
HARCOURT
v.
SEYMOUR.

meant to deal with the 32,000*l.* as personal estate, and that he has so dealt with it.

As to this authority that has been handed up to me—the case of *Stead v. Newdigate*—it is a case that has no bearing upon the question. In that case there was a settlement of real estate, with what Sir *W. Grant* considered to be an absolute covenant to convert it into personalty. Nothing whatever was done, and merely doing nothing, does not alter the case at all.

Merely doing nothing was, apparently, the state of things upon which the opinions of Counsel in 1834, were given; and they were exactly in conformity with *Stead v. Newdigate*, and were, clearly, quite right. But the facts that have come out since, are such that I cannot but feel the most perfect conviction that, if those facts had been before the gentlemen who gave those opinions, the result at which they would have arrived, would have been totally different from that which they did arrive at.

The only other question is with respect to the conveyance executed by *W. B. Harcourt* in May 1835. As that conveyance was clearly executed under a mistake, it must be set aside.

Declare that Earl *Harcourt*, at the time of making his will and thenceforth until his death, intended to treat and did treat the funds representing the 32,000*l.* comprised in the settlement of September 1778, as being of the quality of personal estate, and that it passed, in that quality, by his will: and declare that the deeds executed by *W. Bernard Harcourt* in May 1835, were executed under a mistake, and, therefore, ought to be set aside.

CROSS v. BEAVAN.

THIS was a suit for the administration of a testator's estate, one moiety of which was bequeathed in trust for an infant.

1851 :
28th July.
Decree.
Infant.
Maintenance.
Practice.

At the hearing of the Cause,

Mr. *Simons*, for the infant, submitted that the decree ought to direct the *Master*, to inquire and state whether the father of the infant was of ability to maintain the infant, and, if the *Master* should find in the negative, to approve of a proper allowance, for the maintenance of the infant, out of the income of the moiety of the testator's estate to which the infant was entitled.

In a suit for the administration of an estate in which an infant is interested, it is not necessary to present a petition for a reference as to the maintenance of the infant. The Court will direct the reference by the decree.

Mr. *Nicholls* appeared for another party.

The VICE-CHANCELLOR, at first, thought that the proposed direction could not be inserted in the decree, but that a petition must be presented for the purpose of obtaining it. But, after conferring with the *Registrar*, his Lordship held that the direction might be inserted in the decree.

1851 :

7th August.

*Father and
Child. Infant.
Habeas Corpus.*

ANONYMOUS (a).

THIS was a petition presented by a father, a clergyman, to have the custody of his infant children. It was entitled in the matter of the infants (naming them), and stated his marriage in 1835 with his present wife, and

A father left his home where he was residing with his wife and children, infants, four daughters then ten, nine, eight, and four years of age, and two sons aged six, and three years. He was apprehended, committed, and arraigned for the commission of an unnatural crime, but no witnesses appearing he was acquitted. He immediately left *England* and remained abroad eight months. Five years after the trial he petitioned this Court praying that his wife might be ordered to deliver up the children (the daughters being fifteen, fourteen, thirteen, and nine years old, and the sons eleven and eight years), and, if necessary, that writs of *habeas corpus* might issue for that purpose. The petition was supported by the affidavit of the Petitioner, and was served on the wife only. Affidavits were filed on behalf of the Respondent, and amongst them an affidavit of the solicitor of the wife, who had been the solicitor for the Petitioner, and in that capacity had interviews with him while in gaol awaiting his trial offering to state conversations that took place between them, if authorized by the Petitioner so to do, and an affidavit by another witness referring as an exhibit to the depositions taken before the magistrates. The Petitioner himself made two affidavits in reply, in one of which he denied the charge against him, and in the other sworn three days later he again denied the charge, and gave an explanation of the cause why he was at the place where, and in the company in which, he was when apprehended. The Court being satisfied upon the materials before it that the Petitioner had so conducted himself as that he ought to be treated as if he were a guilty man dismissed the petition.

The Court will refuse to give possession of children to their father if he has so conducted himself as that it will not be for the benefit of the infants, or if it will affect their happiness, or if they cannot associate with him without moral contamination—or if, because they associate with him, others will shun their society. If it be established to the satisfaction of the Court that the father of children from ten to two years of age is to be considered as guilty of the perpetration of an unnatural crime, it is impossible to permit any sort of intercourse with his children even after he has escaped conviction. *Semble*, that under such circumstances, if the children were with their father, it would be the duty of the Court to remove them.

(a) This case was heard in his Lordship's private room. The reporter has been furnished with the following note of it by Mr. *Bone* one of the Counsel for the Respondent.

1851.

ANONYMOUS.

that the above six infants were their lawful children, and were infants of the ages following: three daughters, fifteen, fourteen, and thirteen, a son eleven, a daughter nine, and a son eight years of age. That the wife had since the month of January 1846 been and still was living separate and apart from him. That the Petitioner's children were then in her custody, and that contrary to the wishes of the Petitioner, and without sufficient cause, she refused to permit him to have the care or custody of them, or any of them, or to have access to, or to see them or any of them. That in reply to an application made on behalf of the Petitioner by his agent to the solicitors acting for his wife in a certain Cause pending in this Court between the Petitioner and his wife and other persons, and by which application it was requested that the Retitioner might at all reasonable times have interviews with his children, the solicitors wrote a letter to the Petitioner's agents dated 27th day of June 1851, wherein they stated among other things that they were instructed to decline acceding to such request, and to say that any application by the Petitioner for that purpose would be opposed to the uttermost. That the Petitioner's wife had abetted and assisted in withholding from him the care and control of his children by divers persons, and that the Petitioner was apprehensive that any attempt on his part to enter the residence of his wife and to obtain possession of or to have access to his children would lead to a breach of the peace, and under the circumstances aforesaid he was unable to procure access to his children, or any of them without the interference of this Court. That the Petitioner was willing and desirous to receive, sustain, and support his children, and he therefore prayed that his wife might be ordered to produce and deliver up the

1851.

ANONYMOUS.

above-named infants to him, and that if necessary a writ or writs of *habeas corpus* directed to his wife might issue for that purpose, or that such other order might be made as to the Court should seem fit. This petition was served on the wife only, and no other affidavit was filed in support of it than that of the Petitioner which echoed the petition excepting only in the following passages: "I say that the said children are now, as I believe, supported and maintained by and out of the monies belonging to me, but which my said wife claims to be entitled to and for her separate use by virtue of certain deeds, the execution whereof was improperly obtained from me in the year 1846, and that I have lately instituted a suit in this Honourable Court for the purpose of setting aside such deeds, and the same is now pending." "I say and assign as a reason for making this application during the pendency of the said suit that being deprived of my said children I am utterly desolate, and in great distress of mind as well on account of their future position as my own." The only Respondent, the Petitioner's wife, filed affidavits bearing testimony to her religiously and carefully training the children, and to her being a fit and proper person to have them in her custody, and to have the direction of their education. No imputation whatever was made on her by the Petitioner. The wife's affidavit contained the following passages: "I say that said children are now residing with me except my eldest son, and that I am living separate and apart from my said husband the Petitioner. I say that in January 1846, the said Petitioner executed certain deeds respectively bearing date the 24th day of the same month whereby or by some of which property in the funds, and secured on bonds and transfers of mortgage, were assigned to certain trustees for the benefit of myself

1851.
ANONYMOUS.

and my children by the said Petitioner, with power to me to direct the income thereof, or of any part thereof to be paid to said Petitioner. I say that the said infants were voluntarily left in my custody by the said Petitioner on the 5th of January 1846, and for some time thereafter remained in such custody, with the privity and approbation of the said Petitioner; but since that time the said Petitioner has withdrawn his approbation of such my custody of the said infants, but I say that, although such approbation has been withdrawn, the said Petitioner has not ever, from January 1846 down to the commencement of the suit referred to in his affidavit, required that the custody of the said infants should be given up to him. I say that my income applicable to the maintenance and education of the said infants (over and above the annuity appointed by me in favour of the said Petitioner, by virtue of one of the aforesaid indentures) amounts to 750*l. per annum* or more, and that from the said month of January 1846 to the present time, the said income by the family arrangement effected by the said indentures has been duly and faithfully applied by me in the maintenance, education and support of said infants. I say that I am ready and willing to continue the application of the said income, in the said manner and according to the position, and station and future prospects in the world of said infants and in pursuance of said family arrangement so effected as aforesaid." * * *

"I say that all the said infants are carefully and religiously educated under my own personal care and superintendence, and that said female infants have the attendance of a governess, who was selected and appointed by said Petitioner prior to January 1846, and the said eldest male infant is at school at ———, and the said younger male infant has also the attendance of the said governess, and is educated with the female infants, and all the said infants

1851.

ANONYMOUS.

have other proper instructors, duly qualified to educate them. I say I believe that it will be material to the benefit of said infants, that they should remain in my custody and under my care." The affidavit then, after denying that the wife was abetted by any one, proceeded: "but I admit it to be true that, for the safety and advantage of said infants I do keep them under my own care, and as far as I can from the control and management of said Petitioner, and because the said infants remaining in my custody is conformable to the intention of said family arrangement intended to be effected by the said deeds of the 24th of January 1846, and because their so remaining is, as I believe, essential to their welfare. I say that I have been twice subjected to the pain and humiliation of my eldest son being refused admission into two schools, the masters of such schools alleging, as the reason for their refusal, the injury likely to arise to the repute of such schools if it were known that a child bearing the name of said Petitioner, and known to be his son, was there. I say that I verily believe that the said governess so selected and appointed by the said Petitioner, would immediately relinquish the education of said infants if said Petitioner was allowed to have any interview with them. I say that said governess is the niece of ———, and that when her uncle was acquainted with the fact of the said infants having been left in my custody as aforesaid, he stipulated by express agreement to the effect that so long as she continued to act as governess no communication or access by said Petitioner with or to said infants should be had or permitted, and that if any such communication or access did take place, she should be at liberty immediately thereupon to resign her said situation. I say that my said eldest son is now placed at school, but he was only admitted thereto on the condition that he should pass, and

he does pass, by an assumed name, and upon the assurance that no communication or interview should take place between my said son and the said Petitioner while at such school. I say that a master who is engaged to instruct the said female infants inquired, before he would enter upon his duties, whether there was to be any communication with the said Petitioner, and only entered on the performance of his duties after he was assured that there would not be any such communication. I say that several persons of respectability, and whose acquaintance is valuable to children of the ages of the said infants, have only permitted the visits of the said infants to their families on the distinct understanding that there was to be no communication between the said infants and their father. I say I believe that any intercourse or interview whatever between the said Petitioner and the said infants, or any of them would be in the highest degree injurious to them, and as to one of them, namely, my said eldest daughter, would be dangerous to her health."

1851.
ANONYMOUS.

A surgeon, who resided at the place where the wife of the Petitioner lived, deposed thus: "I say that I am intimately acquainted with many of the most respectable persons in this town and neighbourhood, and, judging from my own feelings as the father of a large family, I conscientiously believe that, if the said Petitioner were permitted to have access to or communication with said infants, in however qualified or restricted a manner such access or communication might be, such persons would refuse to hold any intercourse with said infants or permit them to visit in their said families."

The solicitor of the Respondent, in the matter of this petition (and who was formerly the solicitor for the Petitioner), in his affidavit, spoke as follows: "I say that

1851.

ANONYMOUS.

I have been informed and believe it to be true, as alleged in the bill of the Petitioner, filed in this Court, and which suit is mentioned in the affidavits of the Petitioner, that the Petitioner was, on 5th of January 1846, apprehended and conveyed to the police office ———, and from thence on the same day to the ——— prison, on a charge of having committed an unnatural and capital crime : that, on the evening of said 5th of January 1846 I went to said prison and saw the Petitioner, having in the meantime ascertained the nature of the charge brought against him, and of the depositions which had been taken in support thereof : that on the 6th of January 1846, the Petitioner was again brought up before the magistrates and was committed to the gaol ———, to abide his trial on said charge : that, on the Petitioner's apprehension he gave the false name of ———, and that the alleged participator in the said alleged capital crime was a private soldier : that the grand jury on the said 6th day of January 1846, found a true bill against both : that application was made to the Judges for a postponement of the trial until the next session, which was granted, and that, on Wednesday the 4th of February in the same year 1846, the Petitioner was, by his false and assumed name, together with the soldier, placed on his trial for said capital felony, when the Counsel for the prosecution applied for the further postponement of the same, which was granted, until the end of the said session ; and that, on Saturday the 7th day of the same month, the Petitioner, by his false and assumed name, and the soldier were again placed at the bar, and after another and ineffectual attempt on the part of the Counsel for the prosecution, to have the trial postponed, the Petitioner, described as a labourer (being the occupation by which he described himself when he was before the magistrates), and the soldier were arraigned on the capital charge, but no witnesses appearing the

1851.
ANONYMOUS.

learned Judge who presided addressed the jury, telling them it was impossible to say whether the witnesses had been kept out of the way or not, but that it would be unjust to keep persons in custody when there was no evidence offered against them, and that it was therefore the duty of them, the jury, to return a verdict of not guilty ; whereupon the jury did return a verdict of not guilty accordingly." * * * "I say that, during the imprisonment of the said Petitioner on the said capital charge, I had many interviews with him in the said gaol, at which interviews conversations took place between us the effect of which I do not feel warranted, on account of the professional relation existing between us, to disclose, unless required by him so to do ; and during such interviews, I acted as his solicitor, and, in that character, prepared certain deeds, which bear date the 24th day of January 1846, by some or one of which trusts were declared of such part of the property of the said Petitioner as he had transferred, and, by some other of which, the remaining parts of the property of said Petitioner were conveyed and assigned to trustees, and certain trusts were by such deeds declared thereof, and that in all said indentures it is recited that the same were executed for making further provision for said Petitioner's said wife and children. I say, as alleged in the aforesaid bill of the said Petitioner, which is so as aforesaid referred to in the said Petitioner's said affidavit, that, on the aforesaid 7th day of February 1846, immediately after the said Petitioner was so acquitted of the said capital felony as aforesaid, the said Petitioner was discharged from the said gaol, and, acting under my advice, and in order that the said Petitioner might not be apprehended on a charge of a minor offence founded on the depositions already taken against him, which, I was advised by Counsel learned in the law, the said Petitioner could

1851.

ANONYMOUS.

have been, he was conveyed by a clerk in my service to the ——— railway station, whence he proceeded to ———, and on the same evening crossed over to the continent, where he remained (excepting two short visits to England) down to the 5th day of October in the same year, 1846. I say that I have been informed, and believe it to be true, that the said Petitioner, in consequence of the said charge and trial, and notwithstanding his aforesaid acquittal, at the instance of the patron of the living he held, and in order to prevent the official superior of the said patron from taking proceedings to enforce a resignation thereof, did resign in due form the said office, and thereby deprived himself of the income derived therefrom, amounting, as I have been informed and believe to be true, to the sum of 450*l. per annum*, or more. I say that I have not acted as solicitor for the said Petitioner since the end of the year 1846: that I have heard and believe it to be true, that the said Petitioner, on the 14th day of February 1848, acting upon the advice and recommendation of a physician, entered into a lunatic establishment or asylum at ———, and remained an inmate of the same until the 5th day of March 1848, when he was discharged therefrom by order of the Commissioners of Lunacy, as sane."

A brother of the Respondent, in his affidavit, thus deposed: "I say that, acting for the said Petitioner's said wife, I endeavoured to place the said infant, her eldest son, at two several schools, one being at ——— and the other at ———; but the mistress of one and the master of the other positively refused to receive the said infant, on the express ground, stated by each of them, that the reputation of their said schools would suffer if a child, known to be the son, and bearing the name of the said Petitioner, were received therein: that, not-

withstanding the acquittal of said Petitioner, he surrendered his said living sometime about the end of said month of February 1846 to the patron thereof: I know that the bishop of the diocese in which said vicarage is situate required the Petitioner to resign his benefice, as did also the patron thereof, each of them having full knowledge of the acquittal of the Petitioner: that I have heard and believe the same to be true that, at the time of the apprehension of the Petitioner on said charge, he was at a private room in a public-house in company with the said soldier, and that the Petitioner paid for a pint of a beer, called half-and-half, which he had ordered for himself and the soldier. I say that I have heard, and believe it to be true, that the Petitioner was, at an earlier part of the said 5th January 1846, in another public-house in company with the said soldier, and that the Petitioner and his said companion were turned out of the public-house by the landlord thereof; and that, on the Monday before the said 5th January 1846, he was in company with said soldier, both in ——— street and also in a public-house in a street leading out of ——— street." The witness then deposed to the fact of the engagement of the governess and the stipulation relating to the non-access of the father, as stated in the wife's affidavit, and proceeded: "I say that I have heard, and believe it to be true, that the said infants would be totally excluded from the society of other children of their own station in life by the parents of such other children, if such parents were made aware of any intercourse, however limited or however carefully guarded, taking place between the said Petitioner and his said children, or any of them: I say I have been informed and believe that the heads of families where said infants are now admitted have admitted them on the condition

1851.
ANONYMOUS.

1851.

ANONYMOUS.

that no intercourse be permitted between them and their said father."

A surgeon, residing near the Petitioner's former place of abode, deposed thus: "I say that I am intimately acquainted with many of the most respectable persons in the neighbourhood of the living of the Petitioner, and who have known him: that I believe such persons would, if any communication were known to take place between the infants and their father, refuse to hold any intercourse with such infants, or permit such infants to visit in their families, as they now do at the houses of some such persons; and that were any communication known to exist between the said children and their father, they would be wholly excluded from respectable society."

A surgeon, living where the Respondent (the petitioner's wife) resided, swore thus: "I say that the above-named infants are accustomed to visit my family and associate with my children, but that their visits and association are on the understanding that their father shall not have access to or communicate with said infants: that if said Petitioner shall be permitted to have, and shall have access to, or communicate with said infants, in however qualified or restricted a manner, I shall feel it a duty I owe to my own family to forbid them or any of my children to receive any visits from or have any association with the said infants: that my reason for considering such a course a duty on my part is that I consider the said Petitioner to be a person of so much disrepute that any association or connection with him, or with any person known to be associated with him, by my family or my children, would tend materially to damage their character and reputation in the world."

A clergyman of the same neighbourhood thus deposed :
 —“ I say that the above-named infants are accustomed to visit my family and associate with my grandchildren, but that their visits and association are on the understanding that their father shall not have access to or communication with the said infants : that if the Petitioner shall be permitted to have and shall have access to or communication with the said infants in however qualified or restricted a manner I shall feel it a duty I owe to my own family and character to forbid them, or any of my grandchildren, to receive any visits from or have any association with the said infants : that my reason for considering such a course a duty on my part is that I consider the said Petitioner to be a person of so notoriously bad character and of such disrepute that any association or connection with him, or of any person known to be associated with him, by my family, or my grandchildren, would tend materially to damage their and my character and reputation in the world.”

1851.
 ANONYMOUS.

A justice of the peace also of the same neighbourhood in his affidavit said :—“ I say that the above-named infants are accustomed to visit my family and associate with my children, but that their visits and association are on the understanding that their father shall not have access to or communication with the said infants : that if said Petitioner shall be permitted to have and shall have access to or communication with said infants in however qualified or restricted a manner I shall feel it a duty I owe to my own family to forbid them or any of my children to receive any visits from or have any association with said infants : that my reason for considering such a course a duty on my part, is that I consider the said Petitioner to be a person of such profligate and disreputable character that any association or connection

1851.

ANONYMOUS.

with him, or with any persons known to be associated with him, by my family or my children, would tend materially to damage their character and reputation in the world."

A copy of the depositions of the witnesses sworn before the magistrate, and on which the Petitioner was committed for trial was proved, from which it appeared (if they were true) that the capital felony had been committed, the Petitioner being the passive instrument in the offence. This was the Respondent's case.

In reply to the above evidence the Petitioner filed two affidavits, in one of which he swore thus:—"I say that I was and am wholly innocent of the charge of having committed the unnatural and capital crime mentioned in the affidavit of the said —— (the solicitor) sworn in this matter, and that I never did commit or permit, or attempt to commit or permit the same or any such crime. I say that when in prison I told the said —— (solicitor) that the charge against me was false, as in fact it was, and I was then ready to answer the said charge or any other charge. I say that I observe that the said —— (the solicitor) has alleged in his affidavit that several communications took place between him and me the effect of which he says he does not feel warranted in disclosing on account of the professional relation between us, but I say that the said —— (the solicitor) after he had caused all my property to be taken from me in manner aforesaid, turned round upon me and acted for my opponents, and said all he could to my injury and that if he were to speak the truth he could not say otherwise than that I always said that I was not guilty, and that the witnesses were false witnesses against me."

Three days later the Petitioner by his other affidavit swore as follows :—" As to divers interviews alleged to have been between the said soldier and myself, I say that I never to my knowledge saw the said soldier but once before the day on which I was apprehended on the said charge. I say that on that occasion I met him casually in the street, and that he demanded money which I had not in my possession. And I also say on the day on which I was apprehended I met him for the purpose of giving him the money which he had so demanded: but I altogether deny that on either of the occasions aforesaid, or on any other occasion, I or said soldier did commit or permit, or attempt to commit or permit the said unnatural and capital crime mentioned in the affidavit of said —— (the solicitor) sworn in this matter, and that I never did commit or permit, or attempt to commit or permit the same or any other such crime."

1851.
ANONYMOUS.

In addition to these affidavits six medical men and one clergyman deposed to the excellence of the Petitioner's character, their testimony extending to an acquaintance from 1847 to 1851. No evidence was offered by the Respondent in denial of the statements made in the Petitioner's second and third affidavits, or of the testimony of his witnesses.

Mr. *Malins* and Mr. *Hamilton Humphreys* for the Petitioner stated their willingness to abandon so much of the Petition as sought the delivery up of the children to the father, if an order were made for his access to them, at such times, and regulated in such manner, as the Court might think proper.

The *Vice-Chancellor*: All I could do would be to

1851.

ANONYMOUS.

order that the children should be delivered to the father, were I disposed to do anything on this petition. I could not, however, do that, for the purpose or with the view of forcing the wife to accede to a claim, however reasonable that claim might be, of access to the children. I could not affect the children by means of force put, in this manner, on the wife.

Mr. *Malins* and Mr. *Hamilton Humphreys* then proceeded to argue on the strict legal right of the father to have the custody of the children, and cited *Shelley v. Westbrook* (a), *Lyons v. Blenkin* (b), *Wellesley v. The Duke of Beaufort* (c), *Lord Westmeath's case* (d), *Warde v. Warde* (e), *In re Spence* (f), and *In re Fynn* (g).

Mr. *Bethell*, Mr. *Willcock*, and Mr. *Bone* for the Respondent.

Mr. *Malins* in reply.

The VICE-CHANCELLOR :

The ground for granting the writ of *habeas corpus* by this Court is not the same as for the grant of it by a Court of law. At law the issue of the writ is *ex debito justitiæ*, and in a sense it is so here; but the Court of Chancery has a jurisdiction respecting it, infinitely beyond that of a Court of law. Although this is a petition asking for a *habeas corpus*, if I saw my way, which I do not, I could make a modified order respecting access.

(a) *Jacob*, 266.

(b) *Ibid.* 245.

(c) 2 *Russ.* 1.

(d) *Jacob*, 251.

(e) 2 *Phill.* 786.

(f) *Ibid.* 247.

(g) 2 *De Gex & Sm.* 457.

1851.

ANONYMOUS.

Under the circumstances of this case, whether I am to do anything or not, must depend on this question, not whether I am perfectly satisfied of the Petitioner's guilt, but whether I am satisfied that he has so conducted himself, as that I ought, upon the materials before me, to treat him as if he were a guilty man? Because once suppose it to be established that he is to be treated as a guilty man, the duty of the Court is plain. No case has been cited before me to-day applicable to a case of this kind,—at all applicable to the case in hand. When the Court refuses to give possession of his children to the father, it is the paramount duty of the Court to do so for the protection of the children themselves, and the Court will perform that duty if the father has so conducted himself, as that, it will not be for the benefit of the infants that they should be delivered to him,—or if their being with him will affect their happiness,—or if they cannot associate with him without moral contamination,—or if, because they associate with him, other persons will shun their society. My opinion is, that if it be established to my satisfaction that the father of children from ten to two years of age, is to be considered by me as guilty of the perpetration of an unnatural crime, it is impossible to permit any sort of intercourse with his children, even after he has escaped conviction. Had he been convicted, it is needless to say that no intercourse could take place for he would have been sentenced to death. A party may escape conviction of the crime, and yet the Court may be convinced of his guilt—may experience an overwhelming conclusion as to his criminality. Such is the impression made on my mind on the present occasion upon the evidence before me. Direct and absolute proof of guilt seems now to be beyond our reach: the truth must remain a secret between this man and his Maker. I say, however, that I never saw indications of guilt so clear. The case is this,

1851.

ANONYMOUS.

and I read it from the solicitor's affidavit, and which is so far uncontradicted, "I say that I have been informed and believe it to be true that the said Petitioner was, on the 5th of January 1846, apprehended and conveyed to the police office, and from thence on the same day to prison on a charge of having committed an unnatural and capital crime. I say that, on the evening of said 5th of January 1846, I went to said prison and saw the said Petitioner, having in the mean time ascertained the nature of the charge brought against him, and of the depositions which had been taken in support thereof: I say that, on the 6th of January 1846, the said Petitioner was again brought up before the magistrates, and was committed to abide his trial on said charge. I say that, on said Petitioner's apprehension, he gave a false name, and that the alleged participator in the said alleged capital crime was a private soldier." The deponent then goes on to detail the postponement of the trial and says: "That, on Wednesday the 4th of February 1846 the said Petitioner was by his said false and assumed name, together with the said soldier, placed on his trial for the said capital felony, when the Counsel"—and so on, describing the further postponement, and then the trial and acquittal for want of the appearance of the witnesses. The depositions of the witnesses sworn before the magistrates, show that, if true, a capital felony was undoubtedly committed. Three witnesses depose to certain facts, two of them to the fact of the offence, and to rushing into the room, the confusion of the parties and the state of the dress of the accused persons, and a third witness to the latter circumstance. Upon these depositions, which are sworn to with great distinctness, and perhaps in terms in some degree gross, but with no more clearness than it was the duty of the witnesses to give; upon these depositions I say the Petitioner and the sol-

1851.

ANONYMOUS.

dier were committed for trial. Was then the charge true or false? The trial followed, and that is narrated in the affidavits of the solicitor from which I have just read. The absence of witnesses might arise from the consciousness that they could not substantiate the charge they had deposed to before the magistrates, or it might arise from their being bribed to stay away. If their absence is to be accounted for by their being bribed to stay away from the trial, I must deal with the Petitioner as if he were guilty of the offence. That he was in an upstairs room of a public-house with a common soldier, and that he paid for beer, is by him not disputed. Is the rest of the charge true? What is his conduct? He sends for his solicitor and conveys away all his property before conviction. That is one indication of a consciousness of guilt. Whether it was well conveyed away so as to defeat the right of the Crown in case of conviction, is a question. There are very nice distinctions on that question stated in the books. There is a difference between the period at which the forfeiture is worked as relates to real estate, and as relates to personal property. It is quite sufficient for me to know that it is a common and prevailing notion that property may be well conveyed away before conviction, and that this person conveyed all his property away before his trial. The question whether the Crown would interfere in such a case is quite another matter. But this person's conduct after commitment is to me the strongest indication of guilt, and of his guilt of the whole of the capital charge, for unless the crime were capital the Crown would acquire no right, and need not be defeated.

Then comes one of the strongest facts indicative of guilt. The solicitor has sworn that he had communica-

1851.

ANONYMOUS.

tions with the Petitioner when in gaol, but says he does not feel warranted in disclosing the effect of these communications on account of the professional relation existing between himself and the Petitioner, unless required by him so to do. If the Petitioner were innocent, would he not release the solicitor from the obligation of concealment? Would he care about the disclosure of what passed between him and his solicitor in professional confidence? Would he object to the disclosure by his solicitor of what passed between them in their conversations in gaol? Would he not rather permit, or still more, would he not imperatively demand the whole of the conversations which passed relative to these transactions to be disclosed? But of this he says, in his affidavits, nothing at all. He does not meet the suggestion in the affidavit of the solicitor. His not doing so, coupled with the execution of the deeds, appears to me the strongest mode of proving that the claim of the Crown (which claim could only arise on a capital conviction) was one that would arise. I may here also remark that there is a very common, general knowledge that this claim of the Crown can only arise on a conviction for felony, and that it does not arise on conviction for a misdemeanour. There is no direct evidence before me of the mode in which the witnesses were got out of the way, if they were so; but when we see the description of the witnesses, one the son of a public-house keeper, another what is called a town traveller, and the other a hawker, and that they all frequented a public-house, and were in a humble station of life, we cannot fail to see that their absence may be accounted for, by supposing that high bribes were given them to get them out of the way. At any rate, the witnesses were not forthcoming at the trial, and this person was acquitted. Then, after the trial, he immediately goes away; he quits the coun-

try. He says, and it has been remarked upon, that he went by the advice of his solicitor. What of that? He does not release that solicitor from the obligation arising from professional confidence, as to why that advice was given. He in fact goes away. If innocent, why has he not set the solicitor's tongue free? Any tying of a man's tongue who can speak to the truth, seems conclusive. If innocent, the Petitioner would be anxious to demand that everything he had said relative to a charge of the commission by him of such an odious, horrible and abominable crime should be freely disclosed. To say the least, it was odd that, when discharged, the Petitioner should go abroad, and not to the bosom of his family, or, at any rate, that he should not have sent for them, or described to them his position. He has given no evidence on this petition of any communication between him and his family for six years, or nearly that time. He having gone abroad, this affair comes to the ears of the bishop of the diocese in which the living held by the Petitioner is situate. His lordship and the patron threaten proceedings, and require him to resign, the bishop and patron having, as the affidavits say (and on that point they are uncontradicted), full knowledge of the acquittal. The resignation takes place without opposition or remonstrance. This person then remains abroad till about the end of the same year, and then comes back. Does he go then to his family? I do not know; I am uninformed; the affidavits on that point are an entire blank. In the beginning of 1847, he is in England, and, by advice, goes into a lunatic asylum. Now, that advice may have been very judicious, under the circumstances, to be given by the physician named. I confess I should like to have had an affidavit from that gentleman; his evidence on that point would have been desirable. No one says in these affidavits that the

1851.
ANONYMOUS.

1851.

ANONYMOUS.

Petitioner was a lunatic. He does not say he was a lunatic; all he says is that he was detained "as a lunatic." He himself even does not say he was a lunatic. Now, what is the explanation of all this? The hypothesis of his Counsel is that, having been threatened by a soldier, he gave money, rather than have his name mentioned in conjunction with such a crime, and that, with a view to allow matters to pass over, he went at first, by advice, into the asylum. In the affidavits of the Respondent's brother in support of her case, so far as it relates to the resort by the Petitioner to public-houses, there is this passage: "I say that I have heard, and believe the same to be true, that, at the time of the apprehension of said Petitioner on the said charge, he was in a private room at a public-house in company with the said soldier, and that the said Petitioner paid for a pint of beer, called half-and-half, which he had ordered for himself and the said soldier: I say that I have heard and believe it to be true, that the said Petitioner was, at an earlier part of said 5th January 1846, in another public-house in company with the said soldier, and that the said Petitioner and his said companion were turned out of the said last-mentioned public-house by the landlord thereof; and that, on the Monday before the said 5th January 1846, the said Petitioner was in company with the said soldier in ——— Street, and also in a public-house in a street leading out of ——— Street." Now, what does the Petitioner profess to say to this? "I say that I was and am wholly innocent of the charge of having committed the unnatural and capital crime mentioned in the affidavit of the said solicitor sworn in this matter, and that I never did commit, or permit or attempt to commit, or permit the same or any such crime." So far as to the crime itself. In his other affidavit, sworn three days after the one I have just

1851.

ANONYMOUS.

read from, he goes on: "And, as to divers interviews alleged to have been between the said soldier and myself, I say that I never, to my knowledge, saw the said soldier but once before the day on which I was apprehended on the charge mentioned in the affidavits of the said solicitor." This denial, if it be one, is quite consistent with the statement made in the affidavit of the Respondent's brother. The Petitioner's account, as we shall presently see, is that he, a man utterly unconscious of the existence of the soldier, is met by that soldier, who demands money of him, and, not having money to give, agrees to meet him again and give him what he demands. Now, it might be that a man, having money about him, and having such a demand made upon him, accompanied by such a threat as is supposed, but not stated, might be weak enough to comply rather than hazard publicity, although he might be innocent. But it is quite impossible to believe that an innocent man, unless utterly a fool, would meet the extortioner again for the purpose of complying with the demand. Yet this person thus proceeds with his account;—"I say that, on that occasion, I met him casually in the street, and that he demanded money, which I had not in my possession. And I also say that, on the day on which I was apprehended, I met him for the purpose of giving him the money which he had so demanded; but I altogether deny that, on either of the occasions aforesaid or on any other occasion," he then goes on very much in the same way as before to deny the crime or attempt. Coupled with all this it is to be remarked that the solicitor states, and the Petitioner does not deny, (and, however horrible it may appear, it must be taken as true) that the Petitioner performed divine service in his church on the Sunday, and that, on the very next day, he was in the situation which he has himself admit-

1851.
ANONYMOUS.

ted. Thus we see that he says he appoints a meeting, and he does not deny that they did meet, the place selected being a public-house, and there he orders beer for the refreshment of himself and the soldier in a private room. Now such an account, so absolutely and absurdly incredible, is submitted by this person to the Court as an explanation, and, coupled with the fact of an acquittal, is relied on by him as a proof of innocence. In one sense there has been an acquittal, if there had not he would or might have been hanged for the capital felony. I must deal now with this case on the supposition of this man being guilty. I think the Court ought to go a very great way, when the application is for the removal of children from the mother, to see that they are protected, and although the Court will act for the benefit and protection of children, it will act in all respects with as favourable a feeling as possible towards the father, even when it refuses to give the children up to him. It is impossible, however, here not to see that contact of these children with their father, implies utter exclusion of them from every one else. It is my duty to see that as his society (who I am bound to take as guilty of an unnatural crime in its most aggravated form) would contaminate them, they shall not be placed in any situation—shall not enter into any society—in which they may come into contact with him, or where he may have any chance of meeting them. And were the children with their father I should deem it my duty to remove them. I have omitted to observe, and I now do so, that these witnesses gave their evidence so long ago as January 1846, and yet if they swore falsely they have not been indicted for perjury, as they might have been either at the instance of the Petitioner or of the soldier. The wife is greatly to be pitied—she is to be pitied that she must keep the existence of the father a matter of mystery

to her children ; must keep him to their vision as it were, in a mist. I do not entertain any doubt what course it is my duty to take. I never did entertain any doubt after I had once satisfied my mind that I must deal with the Petitioner as a guilty man. Believing him to be guilty, the custody of the children by him is out of the question. That their education should be entrusted to him, is equally out of the question : and in my opinion, under the circumstances of this case, so proved to my satisfaction, any interview between the father and children is equally to be prevented. All I shall do will be to dismiss the petition.

1851.
ANONYMOUS.

A short discussion then took place respecting the costs, but in consequence of the peculiar situation of the Petitioner, so far as regarded the property, the subject-matter of the suit alluded to in the affidavits, no order was made beyond that of the dismissal of the petition.

Sabbey v. The Crystal Palace District Gas Co. 10 B. & C. 636

THE ROCHDALE CANAL COMPANY v. KING.

1851 :
17th and 18th
July, and 6th
August.

*Injunction.
Establishment
of Plaintiff's
title at law.
Acquiescence.*

The Defendants, the owners of a cotton-mill on the banks of a canal belonging to the Plaintiffs, were authorized, by the Act of Parliament under which the canal was made and the Plaintiffs incorporated, to draw water, from the canal, for condensing steam, but not for any other purpose : nevertheless, they used the water for other

purposes. In consequence of which the Plaintiffs brought an action and obtained a verdict against them, *but only for nominal damages*. The Defendants moved to arrest the judgment in the action, but without success ; and, afterwards, the judgment was affirmed on a writ of error in the Exchequer Chamber. The Defendants, however, continued to use the water as before. Whereupon the bill was filed for an injunction to restrain them from so doing. The answer stated a case of acquiescence on the part of the Plaintiffs.

Held that the Plaintiffs had sufficiently established their title at law, and that, but for their acquiescence, they would have been entitled to the injunction, notwithstanding they had recovered only nominal damages in the action.

IN 1830, *James King* a cotton manufacturer, erected a cotton-mill within twenty yards of the canal ; and, as the Act of Parliament under which the Canal Company was incorporated and the canal made (34th Geo. III. c. lxxviii) authorized the owners of land within twenty yards of the canal, to draw water from the canal for condensing the steam used in working the steam engines in their mills, (provided they returned, daily, an equal quantity of water on the same level, the inevitable waste by consuming the steam excepted) he laid down metal pipes for the purpose of conveying water from the canal to his steam engines. In 1840, he took his son, the Defendant *James King*, into partnership with him ; and, in 1844, they took the other Defendant, *Holdsworth*, into partnership. In May 1848, the Plaintiffs brought an action against the firm, for having, as the Plaintiffs alleged, drawn more water, from the canal, than was sufficient for condensing the steam used in working their engines and applied it for generating steam and other purposes, and for not having returned an equal quantity to the canal, the inevitable waste by condensing the steam ex-

1851.
 THE ROCH-
 DALE CANAL
 COMPANY.
 v.
 KING.

cepted. Messrs. *King* pleaded, to the action, first, not guilty, and, secondly, leave and licence. At the trial in August 1848, a verdict was taken for the Plaintiffs, by arrangement between the Counsel, with one shilling damages; with leave, for Messrs. *King*, to move for a new trial or a nonsuit, or to enter up judgment for themselves notwithstanding the verdict. In November 1848, Messrs. *King* obtained a rule for the Plaintiffs to show cause why the verdict should not be set aside and a nonsuit entered, or why the judgment should not be arrested, or why a *venire de novo* should not issue. The rule was discharged, after argument, in June 1849; and, thereupon, judgment was entered up for the Plaintiffs. *James King*, the father, retired from business in September 1849; after which the Defendants carried on the business in copartnership together: and, as they continued to commit the grievance complained of in the action, the bill was filed in February 1851, praying for an injunction to restrain them from drawing water from the canal for any other purpose than the condensing of steam used in working their engines, and from drawing it for that purpose, without returning an equal quantity, daily, on the same level; the inevitable waste by condensing the steam, excepted.

The answer stated that, in 1830, metal pipes were laid down, by *James King*, the father, after notice given, by him, to the Plaintiffs, of his intention to make a communication between the water in the canal and the steam-engines in his mill, in order to draw, from the canal, such quantities of water as should be sufficient to supply the engines with water for the purpose of condensing the steam used for working the engines, raising steam, making sow (a preparation of flour and water for stiffening cotton) and cleansing the boilers; and that the

1851.
THE ROCH-
DALE CANAL
COMPANY
v.
KING.

servants and agents of the Company, superintended the laying down of the pipes, and well knew the capacity thereof, and the purposes for which water from the canal was to be drawn or conveyed through and by means of the pipes; and that they acquiesced therein and were cognizant of the expense incurred in laying down the pipes for such purposes: That *James King*, the father, from the time when he erected the mill, down to September 1849, when he retired from business, drew water from the canal, by means of such pipes, with the knowledge of the Plaintiffs, for the purpose of condensing and raising steam, heating the mill and making sow, without any objection on the part of the Plaintiffs, except the bringing of the action in 1848; and that, in 1840, he expended many thousand pounds, with the knowledge of the Plaintiffs, in enlarging the mill and erecting additional engines in it, which he would not have done (as the Plaintiffs well knew) if any objection had been made or had been likely to be made, by the Plaintiffs, to the use of water from the canal for the purposes aforesaid: That the rain which fell on the mill, was conducted to the canal, by pipes, and that the Defendants had always returned more water to it than they had drawn from it: That the Defendants had brought and were prosecuting a writ of error from the judgment in the action: That, from the time when the mill was erected, the Plaintiffs had frequently inspected it by their agents and servants, and they knew of the mode in which water was drawn from the canal and used and afterwards returned, and had, by their acts, encouraged the Defendants and *James King*, the father, to expend large sums of money on the mill and the engines and the fittings thereof, upon the faith and the implied understanding that the use of the water mentioned in the answer, was proper and would not be interfered with by the Plaintiffs: That there was always

more water in the canal than was required for the navigation thereof: That the Defendants would not, and they believed that *James King*, the father, would not have expended any money upon the mill and premises, if there had been any reason to believe or suspect that the use of the water in the canal for the purposes and in the manner before mentioned, would have been questioned or interfered with by the Plaintiffs; and that the Plaintiffs had encouraged the Defendants to expend money on the mill and premises, by permitting the use of the water for so many years; and that, under the circumstances appearing in the answer, the Plaintiffs were not entitled to any relief against the Defendants, or to prevent or interfere with the Defendants in the working of their mill and the use of the water in the canal as before mentioned, and that, if the Plaintiffs ever had any right to prevent such use, they had lost the same by having permitted the Defendants and *James King*, the father, (under whom they claimed) to expend money on the mill and premises, without interference and on the presumption that they might continue to use the water as it had been always previously used; and that, after the length of time during which the Plaintiffs had permitted the Defendants and *James King*, the father, to use the water as before mentioned, they had no right or claim to interfere therewith and ought not to be permitted so to do.

After the answer had been filed, the writ of error was argued in the Exchequer Chamber, and the judgment in the action was affirmed.

On the hearing of a motion for the injunction prayed for by the bill, the questions were; first, whether the Plaintiffs had sufficiently established their title at law; secondly, whether, if the Plaintiffs had sustained any

1851.
 {
 THE ROCH-
 DALE CANAL
 COMPANY.
 v.
 KING.

injury, it was not so trifling that the Court ought not to interfere; and, lastly, whether the Plaintiffs had not precluded themselves, by acquiescence, from asking the assistance of the Court.

Mr. *Bethell* and Mr. *Baily* supported the motion.

Mr. *Malins* and Mr. *Glasse* opposed it.

The cases cited were *Goodman v. Be Beauvoir* (a), *Elmhirst v. Spencer* (b), *Hilton v. Lord Granville* (c), *Barret v. Blagrove* (d), *The Att.-Gen. v. The Manchester and Leeds Railway Company* (e), *Barnard v. Wallis* (f), *Waters v. Taylor* (g), *Fielden v. The Lancashire and Yorkshire Railway Company* (h), *Harrow School v. Alderton* (i).

The *Vice-Chancellor*, after hearing Mr. *Baily* in reply, said that his opinion was that the Plaintiffs were entitled to the injunction, unless they had precluded themselves, by acquiescence, from asking the assistance of a Court of equity: as to which he should reserve his judgment until he had had an opportunity of minutely examining the evidence in the case.

6th August.

The VICE-CHANCELLOR :

This was a motion to restrain the Defendants from using water, drawn from the canal, for any other purpose

(a) 4 Railw. C. 380.

(b) 2 Macn. & Gord. 45.

(c) Cr. & Phill. 283.

(d) 6 Ves. 104.

(e) 1 Railw. C. 436.

(f) 2 Railw. C. 162.

(g) 2 Ves. & Beam. 299.

(h) 2 De Gex & Sm. 531.

(i) 2 Bos. & Pull. 86.

than that of condensing steam. The Defendants are the owners and occupiers of a cotton-mill near the banks of the *Rochdale Canal*. The Plaintiffs, the Canal Company, were incorporated by the 34th Geo. III. c. lxxviii. The 113th section of that Act is set out in the bill, and is as follows: "And whereas steam-engines are become of great use in various manufactures carried on within the said counties," that is, *Yorkshire* and *Lancashire*, "and, as such engines consume considerable quantities of coal, they will, by the rates which will be payable for such coal, tend to promote the interests of the said navigation: but, the said engines can only be made use of where cold water can be obtained to condense the steam used in working them; on which account, as well as for the better supply of the same with coals, it will be convenient to erect such steam-engines as near as may be to the said navigation: Be it, therefore, further enacted that it shall be lawful for the owners of any land within the distance of twenty yards from the said canal, to make a communication, between the water therein and any steam-engine or engines, by means of one or more metal pipe or pipes of sufficient strength and thickness, and so constructed as to prevent any leakage or waste of water; and to draw, from the said canal, such quantities of water as shall be sufficient to supply the said engine or engines with cold water, *for the sole purpose of condensing the steam used for working any such engines as aforesaid*: Provided always that the proprietor of every such engine, shall return, to the canal, in every day on which he shall use such engine, a quantity of water, on the same level on which it shall be taken, equal to the quantity so taken, in every such day, from the said canal, (the inevitable waste thereof by condensing such steam only excepted); so that no obstruction shall arise, therefrom, to the said na-

1851.
 THE ROCH-
 DALE CANAL
 COMPANY
 v.
 KING.

1851.
THE ROCH-
DALE CANAL
COMPANY
v.
KING.

vigation : Provided also that such water so taken shall be applied to the working of the said engine, and to no other use or purpose." Then subsequent acts passed in the 39 & 40 Geo. III. and the 46 Geo. III. ; and the 13th sect. of the 46 Geo. III. is as follows ; " And whereas the power of taking water for the condensing of steam in the engines near to the canal, may be abused ; and it is expedient that the provisions relating thereto should be explained and amended : Be it, therefore, further enacted that, from and after the passing of this Act, it shall be lawful, for any agent or servant or agents or servants appointed by the committee of the said Company for that purpose, on making information in writing, on oath to be administered by any justice of the peace, that such agent suspects or believes that such power is abused, and on depositing, in the hands of such justice, the sum of 20*l.* for the purposes hereinafter mentioned, and delivering, to the person or persons using such water, a copy of such information, at all seasonable times, to enter into any building containing such steam-engine, for the purpose of examining any pipe used for the conveying of such water and ascertaining the use made of such water, and that the same is not applied to any other purpose than that of condensing the steam of any such engine."

The mill of the Defendants was built, in 1830, by the father of the Defendant *King* ; and, under the authority of the first-mentioned Act of Parliament, pipes were then laid, from the mill to the canal, so as to supply the mill with water. In the year 1847, disputes arose, between the Plaintiffs and the Defendants, as to the use of the water so derived from the canal, the Plaintiffs alleging that the Defendants had no right to draw water for any other purpose than that of condensing steam. On

the 8th of May 1848, an action was brought, by the Plaintiffs against the Defendants, for using the water for other purposes than that of condensing steam. The particulars of the action are set out in the bill. It was an action, in the Court of Queen's Bench, against *King* the father and against the Defendants; and the declaration stated the first-mentioned Act of Parliament, and the making of the canal, and that, before and at the time of committing the grievances therein complained of and at the date of the action, the Defendants were the owners and possessed of certain lands within the distance of twenty yards from the canal, and of a certain cotton mill containing two steam-engines, such engines being erected and used, by the Defendants, for the purpose of working the mill. Then it states that the Defendants had given notice of their intention to make, and had made a communication between the water of the canal and the steam-engines, according to the provisions of the Act, in order to draw, from the canal, such quantities of water as should be sufficient to supply the engines with cold water for the purpose of condensing the steam used for working the engines. Then the declaration alleged that, although large quantities of water were drawn, from the canal, through and by means of the pipes, which water the Defendants ought to have used for the sole purpose of condensing the steam used for working their engines; nevertheless, they had used it for other purposes. Then there were other grievances complained of, which are not material to be considered. To this there were two pleas; first, a plea of not guilty, secondly, a plea of leave and licence. The Cause was tried at the Summer Assizes of 1848: when a verdict was found for the Plaintiffs, with 1*s.* damages. Afterwards, in November 1848, a rule *nisi* was granted, by the Court of Queen's Bench, to show cause why the judgment should

1851.
THE ROCH-
DALE CANAL
COMPANY
v.
KING.

1851.
 {
 THE ROCH-
 DALE CANAL
 COMPANY
 v.
 KING.

not be arrested. That rule was argued in June 1849, when the Queen's Bench gave judgment for the Plaintiffs; and this judgment was afterwards affirmed on a writ of error in the Exchequer Chamber; and so the legal title of the Plaintiffs, was conclusively established. In October 1850, *James King*, the father, died. The bill was filed on the 6th of February last; and it states all these facts, and also that the Defendants, who now work the mill, continue, in defiance of the judgment, to abstract and use the water of the canal for other purposes than the condensing of the steam used in working the engines in their mill: And it prays for an injunction to restrain them from so doing, without returning, daily, an equal quantity of water, on the same level, the inevitable waste by condensing the steam, excepted.

This motion is made, on the filing of the bill, upon notice, in conformity to the prayer of the bill.* It was resisted on two grounds: first, because the subject-matter was too trifling for the interference of a Court of Equity; the damages recovered having been only 1s.; and, it was said, they never would be more; and, therefore, the Court ought to leave the Plaintiffs to bring actions at law. But, to this proposition, I do not assent, as I stated at the hearing of the motion.

If the title of the Plaintiffs is once clearly established, the right is one of great value, though the damages recovered in each particular action, might be very small or merely nominal; for the necessities of the Defendants would oblige them to pay water-rent for the right re-

* The notice of motion was dated in February 1851. The answer to the bill was not filed until April following. In the mean time, affidavits had been filed on both sides.

quired. I see no reason to alter the opinion which I expressed on this part of the case, when I heard the motion.

1851.

THE ROOHD
DALE CANAL
COMPANY

v.
KING.

The *Harrow School* case went on the special nature of an action of waste ; which can only be supported when the act complained of is done to the disherison of the Plaintiff. Cases of nuisance, when the injury, if any, is inappreciably minute, as in *Elmhirst v. Spencer*, proceed on the ground that the party complaining of such acts is entitled to no relief beyond what the strict assertion of his legal right gives to him ; and so this Court refuses to interfere.

It is not necessary, however, to consider to what case that doctrine is applicable ; because, here, what is complained of, is not a nuisance, but a wrongful invasion of the right of the Plaintiffs, without making to them compensation for that for which they have a right to claim compensation.

But the motion was further resisted on the ground that the Plaintiffs had, by acquiescence, precluded themselves from asserting the legal right on which they now insist.

The mill in question was erected, in the year 1830, by *James King*, the father of the Defendant *King* ; and the Defendants insist that, at that time, it was well known, to the Plaintiffs, that *King* erected the mill in the belief that he might lawfully take and use, and that, ever since that time, he and the Defendants deriving title under him, have, in fact, taken and used the water of the canal for all purposes for which they had need of it, and not merely for condensing steam ; and that all this

1851.
 {
 THE ROCH-
 DALE CANAL
 COMPANY
 v.
 KING.

was well known to and acquiesced in by the Plaintiffs. Whether this be so is a question, not of law, but of fact. The rule of equity in such cases, is clear and is stated by Lord *Eldon* in *Dann v. Spurrier* (b). "This Court," his Lordship says, "will not permit a man, knowingly though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on, is, in many cases, as strong as using terms of encouragement. A lessor knowing and permitting those acts which the lessee would not have done, and the other must conceive he would not have done but upon an expectation that the lessor would not throw an objection (obstacle *qu.*) in the way of his enjoyment." I must remark that there is some inaccuracy in the language of the report: at least, it is not grammatical; there is a nominative case without a verb, but the sense is plain enough.

This doctrine being well established, the only matter for my consideration on this motion, is whether the facts of this case are such as to bring these parties within the rule. I think they are. The Defendants, by their answer, swear that, to their belief, when the mill was originally built by *James King*, the father, in 1830, express notice was given by him, to the Canal Company, of his intention to make a communication with the canal in order to draw from it water, not only for the purpose of condensing steam, but also for the purpose of raising it and of making saw, and for other purposes; and that the servants and agents of the Company superintended the laying down of the pipes, and were aware of the uses to which they were to be applied, and made no objection, though they were cognisant of the great

(b) 7 Ves. 231, see 235.

expense incurred. Now, unquestionably, if this be true, the Plaintiffs can have no relief in this Court. Such conduct, even if it be not sufficient to sustain a plea of leave and licence in bar to an action, certainly incapacitates the Plaintiffs from obtaining any assistance in a Court of Equity. It is not necessary to go further, and say whether it would not entitle the Defendants to restrain them from proceeding at law, according to what was stated by Lord *Eldon* in *Barret v. Blagrove*. The allegation of acquiescence rests, it is true, mainly on the answer. From the nature of things, it would not be likely there could be much of confirmation; but there is some. *Murray*, in his affidavit, says that he and all the other mill-owners on the banks of the canal, use the water for all purposes: that this is perfectly notorious, and has always been well known to the Plaintiffs' overlooker. Mr. *Radcliffe* says he erected his mill twenty-seven years ago, and put up a sluice by means of which he might obtain water from the canal, and that he did this with the full knowledge of the Plaintiffs. And *Bullock* and *Taylor* both speak of facts of similar import. Now I entirely assent to the argument, very ably urged by Mr. *Baily*, that mere acquiescence (if by acquiescence is to be understood only the abstaining from legal proceedings,) is unimportant. Where one party invades the right of another, that other does not, in general, deprive himself of the right of seeking redress, merely because he remains passive: unless, indeed, he continues inactive so long as to bring the case within the purview of the Statute of Limitations.

If, therefore, from 1830 to 1847 when the disputes began, the Plaintiffs might have asserted the legal right on which they now insist, their not having done so during that period, would not preclude them. But the evi-

1851.
 THE ROCH-
 DALE CANAL
 COMPANY
 v.
 KING.

1851.
 {
 THE ROCH-
 DALE CANAL
 COMPANY.
 v.
 KING.

dence of long-continued use of the water, for all purposes, by the adjacent mill-owners. may be very important, as tending to satisfy this Court that, when the mill of the Defendants was erected, the Plaintiffs must have known that *King* who was building it, was laying out his money in the expectation that he would have the same privilege of using the water as was enjoyed by all his neighbours. Whether however the weight attributable to the affidavits be more or less, I think that, the issue being distinctly raised in the answer, I ought not, under the circumstances of this case, to interfere on this interlocutory application.

There is one point on which evidence may be obtained at the hearing, which may have a material bearing on the result: I mean whether, when *James King*, the father erected his mill in 1830, there were any other means, practicably available to him, for getting water, besides the canal: for, if there were not, it will be difficult to satisfy the Court that the Plaintiffs could have been unaware that *King* must have been acting on the belief that he would be allowed to take, from the canal, water for all purposes. Again, it may be important to show, by evidence, how far, from the construction of and the mode of working a steam-engine, it may or it may not be practicable to use water, derived from one source, for condensing, and water from a different source, for raising steam. If this be practicable, as, from the affidavit of *Henry Eaton* filed on the 2nd of March, it would seem to be, it will remove one difficulty in the way of the Plaintiffs' case. If, on the other hand, it is impracticable, or even very unusual, it will strongly tend to confirm the Defendants' proposition, and to bring the Plaintiffs within the principle enunciated in *Dann v. Spurrer*.

On these grounds I shall refuse this motion, reserving the question of costs till the hearing.

Beywood v. Beywood 9 W.R. 61.
BOURNE v. BUCKTON.

EX PARTE J. C. HAIG AND MARIA HIS
WIFE. *Will. v. Will. 10 W.R. 324*

THE will of *William Stains*, the testator in the Cause, contained a trust for accumulating the rents of his real estates, and also a trust for accumulating the income of his residuary personal estate. The former was the subject of a petition presented by his niece, *Elizabeth Stains* (a); the latter was the subject of the present petition.

The testator gave his residuary personal estate, to *John Buckton* and *Thomas Bourne*, in trust to invest the same or any part or parts thereof, in their names, in the purchase of freehold lands in Kent, and which he directed to be forthwith settled, conveyed and assured to such and the same uses and upon such and the same trusts as were, thereafter, by him declared of and concerning such part or parts of his residuary personal estate as should not be, by his said trustees, laid out and invested in such purchase or purchases aforesaid, or as near thereto as the deaths of parties and other contingencies would admit of; and upon further trust, at their

1851.
THE ROCH-
DALE CANAL
COMPANY.
v.
KING.

1851.
15th, and 21st
Nov.

Accumulation.
Thellusson Act.

A testator gave his residuary personal estate to *A.* and *B.* in trust to accumulate the income during the life of his niece, and, on her death, to transfer the capital and accumulations to her children, in equal shares; the shares to be vested, in her sons, at twenty-one, and, in her daughters, at that age or marriage. The niece lived more than twenty-one years after the testator's death.

Held that the direction to accumulate, was not a provision for raising portions within the meaning of the second section of the *Thellusson Act*, and that, therefore, it became void, under the first section, at the expiration of twenty-one years from the testator's death: and that his next of kin were, thenceforth, entitled to the income of the capital and accumulations.

(a) See *Halford v. Stains*, 16 Sim. 488.

1851.

BOURNE

v.

BUCKTON.

or his discretion, as to such parts of the said residue as should not be laid out and invested in such purchase or purchases as aforesaid, and also, in the mean time and until such purchase or purchases should be made as aforesaid, as to the whole of the said residue, to lay out and invest the same in their names, on Government or real securities, and to accumulate the income of the securities during the life of *Elizabeth Stains*; and, from and immediately after her decease, upon trust to transfer the securities and accumulations unto the child, if only one, and, if more than one, to the younger children of *Elizabeth Stains*, equally as tenants in common, and to be vested in sons, at twenty-one, and in daughters, at twenty-one, or on marriage. He then declared trusts, as to *the shares* of the children of *Elizabeth Stains* who should die in her lifetime leaving issue, for the benefit of their issue, and, as to *the shares* of those who should not leave issue, for the survivors of them. And he empowered the trustees, after the decease of *Elizabeth Stains*, to apply the income of *the portion* of each of the said children and issue being minors, for their maintenance, and to apply one half of their then vested or expectant *shares*, for their advancement, and he declared that all sums which should be advanced to or for each of such children or issue, should be considered as a part of his or her said *portion or share*, and should be deducted out of the same, notwithstanding his or her death before his or her *portion* should be absolutely vested; and that so much of the income of the *portion or share* of each of the same children and issue, as should not be applied for their maintenance and advancement, should be added to and accumulated together with the principal of the same *portion or share*, and be subject to all the limitations, trusts and dispositions thereinbefore and thereafter contained concerning the principal of

the same *portion or share*, until the principal should become payable. The testator then declared that, on failure of the preceding trusts, the trustees should stand possessed of the securities and accumulations, upon the same trusts for the benefit of the children and issue first of *Edwin Stains*, secondly, of *Henry Palmer*, and lastly, in trust for his own next of kin.

1851.
BOURNE
v.
BUCKTON.

The testator died in 1827. His brother *James* was his sole next of kin. *James* died in 1828. The Petitioner, *Maria Haig*, was his personal representative.

The Petition stated, amongst other things, that the Petitioners were advised that the trust for accumulation during the life of *Elizabeth Stains*, (who was still living,) as regarded the testator's residuary personal estate, *was good only for the period of twenty-one years which had elapsed from the day of his death*, and which period expired on the 24th of September 1848; and it prayed that the Petitioner, *J. C. Haig*, in right of the Petitioner, *Maria* his wife, the personal representative of *James Stains*, might be declared to be entitled to all the income which had arisen or been received or made, since the 24th of September 1848, from or in respect of the testator's residuary personal estate or any previous accumulations thereof, and to all the income which should or might arise or be received or made, of or from such residuary personal estate or accumulations, during the life of *Elizabeth Stains*.

At the hearing of the petition,

Mr. *Rolt* and Mr. *Fooks* appeared for the Petitioners; and,

1851.

BOURNE

v.

BUCKTON.

although *Elizabeth Stains*, whose children were provided for, took a contingent interest; and although *Edwin Stains*, whose children also were provided for, took a life-estate in remainder, yet the trust for accumulating the rents, did not come within the meaning of the second section of the Act, The reasons that he gave were, first, that the portions spoken of in the second section of the Act, were portions created by some instrument prior to the will; and, secondly, that the testator, himself, had called what the children were to take, 'shares,' and, therefore, they could not be considered as coming within the meaning of the term, 'portions.' Now I must say, with all deference and respect for the opinion of that learned Judge, that I cannot concur in either of the reasons assigned for the judgment. I do not conceive that the second section of the Act, was intended to apply only to portions created by another instrument. On the contrary, although I am persuaded it was not meant to exclude portions created by another instrument, I believe the portions in the contemplation of the Legislature, were the portions created by the very instrument itself. With respect to the other reason, that they are called, 'shares,' it is to be observed that the testator as often calls them, 'portions,' as, 'shares.' Sometimes he calls them 'shares;' sometimes he calls them, 'portions,' and sometimes he terms them, 'portions or shares:' and I must say that there is no difference between the meaning of the two words. But, though I dissent from the reasons for the decision, I entirely assent to the propriety of the decision itself.

There is some difference between the case as to the personal estate, and the case as to the real estate; but,

my opinion is that the trust for accumulating the personal estate can, in no proper sense, be said to be a provision for raising portions within the meaning of the second section of the Act. Observe what it is. It is not a direction, out of rents and profits, or out of the income of the estate, or by felling timber on the estate, or by any of the ordinary modes, to raise a certain sum for the benefit of younger children or children generally, or to raise a sum of money for each child; but it is a direction that the whole residuary personal estate shall be accumulated during the life of *Elizabeth Stains*, for the purpose, not of raising portions but of increasing a fund the aggregate amount of which is given, after the death of *Elizabeth Stains*, first, among her children, next, among the children of *Edwin Stains*, and, lastly, among the children of *Henry Palmer*. It is very true, with respect to this Act of Parliament which has often been made the subject of commentary by different Judges, that it is extremely difficult to lay down, *a priori*, a definition of the term, 'portions,' which includes all those cases which ought to be included, and which excludes all those which ought to be excluded: but my opinion is that, when a testator directs the income of his personal estate to be accumulated for a certain period, and, at the expiration of that period, gives the accumulated fund amongst children, the shares which the children are to take, are not portions within the meaning of that term as used in the second section of the Act, and, consequently, the direction for accumulation, is not a provision for raising portions within the meaning of that section.

That opinion, which I formed independently of any authority, is corroborated by the decision of the late *Master of the Rolls*, in *Eyre v. Marsden (a)*, which was
(a) 2 Keen, 564.

1851.
BOURNE
v.
BUCKTON.

1851.

BOURNE

v.

BUCKTON.

not cited when this case was argued. In that case the testator, who had three children living and had had another child who was dead leaving children, gave certain annuities, out of his residuary estate, to his three surviving children, and requested the surplus of the annual income to be applied in accumulation of the capital of his property for the benefit of his grandchildren, and which was to be divided between them after the death of the survivor of his three children. Thirty years elapsed between the death of the testator and the death of the survivor of the three children; and it was held that the direction for accumulation beyond twenty-one years from the testator's death, was void under the first section of the Thellusson Act; and that the case did not come within the exception in the second section. That statement of the case, which I have read from the marginal note, shows that there were annuities given, out of the general estate, to the testator's three children who were living at the date of his will and who survived him. But he had had another child, who had died, leaving issue, in his lifetime, before the date of his will, and the parties to whom the accumulated fund was to go at the death of the survivor of the three children living, were all his grandchildren, that is, the children of his deceased child as well as the children of the survivors. The *Master of the Rolls* decided that the gift did not come within the second section, but was void under the first, for two different reasons; one not applicable to this case, and the other clearly applicable to it. One was that the grandchildren for whom provision was made, were partly the children of persons who took a benefit under the will, and partly the children of a person who took no benefit, namely, the deceased child. The other reason, (which applies to the present case,) was that the accumulation which was directed, was not a provision for raising por-

tions, but a provision for making additions to the capital, for the purpose of making one gift of an aggregate fund: therefore, I am perfectly satisfied that Lord *Langdale*, if the present case had come before him, would have decided that the direction to accumulate in this case, was given, not for the purpose of raising portions for children, but for the purpose of increasing the amount of the fund which the children are to take; and, therefore, that it did not come within the exception in the 2nd section of that Act.

1851.
BOURNE
v.
BUCKTON.

There is also a little allusion to this point in the judgment, given by Mr. Justice *Bosanquet*, in the case of *Shaw v. Rhodes*. He just touches on the point, and indicates, as it appears to me, that his opinion, also, would have been to the same effect.

Having stated one reason why the case did not fall within the exception, in the Thellusson Act, respecting provisions for raising portions for the children of persons taking an interest under the devise, he says, in page 159 of the report: "But, independently of this answer, I do not think the case falls within the meaning of the exception. Where the whole rents and profits are given, in the first place, to persons during the lives of their parents," (he is referring to the particular provisions in *Shaw v. Rhodes*, which are very peculiar,) "with the exception of small annuities only, to be paid, thereout, to the parents themselves for their own lives, and a gift to the same persons after the death of their parents, is superadded, to be paid out of the subsequent rents and profits, I cannot think that the superadded gift is to be considered, within the meaning of the Statute, in the nature of a portion to the children of persons taking an interest under the devise." The circumstances of *Shaw v. Rhodes* are so peculiar that it makes that observation

1851.

BOURNE

v.

BUCKTON.

less distinctly applicable to the present case ; but I think it shows that Mr. Justice *Bosanquet* considered that it was not merely because it was a gift to the children of persons, to be divided among them, that, therefore, it was a provision for raising portions for those children.

I think I ought to refer to another point which has been the subject of discussion and ingenious argument ; which is this. As I have already observed, the second section enacts that the Act shall not extend to a provision for the raising of portions for the children of a person taking an interest under such devise. Now, it is very difficult to know what is exactly meant by, "such devise." The word, "devise," does not appear in any part of the Statute. The word, "devisor" or, "testator," does appear. I have observed, before, that neither *Elizabeth Stains*, whose children are first to take, nor *Edwin Stains*, whose children are to take in the second place, takes any benefit in the personal estate ; but each of them does take some sort of interest in the real estate, which is a separate devise altogether. And it was argued that the words, "such devise," must mean taking an interest under the will, and not under the particular gift. But I cannot conceive that, by any inaccuracy of expression, the word, "devise," could ever be used to signify the whole will. You never could say, even with the utmost latitude of inaccuracy, that the testator made his last devise and testament ; that his executors proved his devise in the Prerogative Court ; but you may, with a very common inaccuracy of expression, apply the term, "devise" to either the real or the personal estate. It is very common, although not very correct, to say : "he devised all the residue of his real and personal estate to trustees on trust," &c. It would be more correct to say : "he devised and bequeathed,"

that is, devised the real estate and bequeathed the personal; but still, it appears to me that the meaning of the expression, "such devise," is that the parent must take an interest under the particular gift, devise or bequest which contains the provision for accumulation. Because, if it were not so, a man might say, "I give my silver watch to *A. B.*," and then, "I give all my real and personal estate to trustees, to accumulate for a period of fifty years, if *A. B.* shall so long live;" and then give it all to the children of the person to whom he had given the silver watch. It is called by Counsel, in arguing the case on the appeal from *Shaw v. Rhodes*, the case of *Evans v. Hellier*, a fraud on the Act of Parliament to put such an interpretation on it; and Vice-Chancellor *Knight Bruce*, in the case of *Morgan v. Morgan*, held that a gift of specific chattels to the parents of a child for whose benefit a sum of money was directed to be accumulated for more than twenty-one years from the death of the testatrix, would not bring the case within the operation of the second section of the Act.

It is, however, unnecessary for me to decide this second point, if I am right on the first point, that these are not portions within the meaning of the second section; and, being of that opinion, I shall declare that, from the expiration of the twenty-one years from the death of the testator, the provision for accumulating his personal estate, is void.

Then comes the question to whom is it to go? It was contended that it should go to the heir-at-law of the testator, by reason of the direction to lay it out in real estate. But it must be remembered that the heir-at-law can take nothing as heir, but what was the testator's own real estate. No direction in the will to lay

1851.
BOURNE
v.
BUCKTON.

1851.

BOURNE

v.

BUCKTON.

out the testator's personal estate in realty, will make the land purchased pursuant to that direction, the testator's realty. He may give and devise it as if it had been his own real estate, and then it would go to his heir-at-law; but, in the absence of any such particular gift or devise, what was his personal estate must go to his next of kin, if undisposed of by his will. Therefore, I shall make a declaration, in the terms of the prayer of this petition, that the Petitioners, who are the personal representatives of *Edwin Stains*, the brother and sole next of kin of the testator at his death, are entitled to receive the income of the testator's residuary personal estate and of the accumulations thereof, from the expiration of twenty-one years from the death of the testator until the death of *Elizabeth Stains*.

The costs of all parties must be paid out of the property which I determine to be undisposed of.

In the course of the judgment, Mr. *Malins*, *amicus Curiae*, mentioned a case of *Swabey v. Hamer*, decided by V. C. *Knight Bruce* but not reported.

The *Vice-Chancellor* said that it was precisely in point, and that it confirmed the opinion which he had formed upon the case before him.

IN THE MATTER OF BRYAN'S TRUST,
EX PARTE W. DARNBOROUGH.

ANN BRYAN made her will, dated the 16th of May 1808, in the following words :

"I give and bequeath unto my son, *John Bryan*, the sum of twenty pounds ; unto my daughter, *Ann*, the wife of *James Winson*, ten pounds and my diamond ring ; unto my daughter, *Harriet*, the wife of *William Darnborough*, ten pounds, also my gold watch and seal ; unto *Mary Bryan*, the wife of my son, *John Bryan*, my pearl hoop ring. I also give and bequeath unto my friend, Mr. *Burrell*, of *Surrey Place*, two guineas for a ring ; likewise, to Mrs. *Burrell*, a like sum for the same purpose, in remembrance of me : Lastly, I give and bequeath unto my daughter, *Mary*, the wife of *William Dudley*, the ring given me in remembrance of the late *John Weatherhall*, also all my wearing apparel and the several articles of furniture particularized in the schedule affixed hereto : And, further ; after my funeral expenses and the aforesaid legacies being duly discharged, I will and direct that the interest arising from the stock then remaining in my name in the Bank of *England*, be received and paid, half-yearly, to my said daughter *Mary*, during her life, and for her own use, by my executor, his heirs or assigns ; and that her receipt only for the same be his or their discharge. I also will and direct, notwithstanding what is directed in the preceding clause, that, should my executor

1851.
4th Nov.
Will.
Construction.

Testatrix gave legacies to her son, *John Bryan*, and to her daughters, *Ann*, the wife of *James Winson*, *Harriet*, the wife of *William Darnborough*, and *Mary*, the wife of *William Dudley* : and she gave her stock in the bank to her said daughter, *Mary Dudley*, for life, and after her death, to be equally divided between the husbands of her said daughters and her son, or such of them as might be living at *Mary Dudley's* decease. All the husbands named in the will, survived the testatrix ; but *William Darnborough*

was the only one of them who survived *Mary Dudley*. *Ann Winson*, however, married a second time, and her second husband was living at *Mary Dudley's* death, and he claimed a share of the stock. But the Court held that, by the words : "the husbands of my said daughters," the testatrix meant their husbands whom she had named ; and, therefore, that *William Darnborough* was exclusively entitled to the stock.

1851.

BRYAN'S
TRUST.

think proper to sell the principal of the said stock out of the Bank, and purchase an annuity, with the proceeds of the said stock, for the life of my said daughter, to be received by him and paid to her receipt only, I do hereby authorize and empower him so to do ; but, should he not so dispose of the said stock, then I give and bequeath, after the decease of my said daughter *Mary*, the whole of the said stock to be equally divided between *the husbands of my said daughters and my son, or to such of them as may be living at the time of her decease*. And I do hereby appoint my son, *John Bryan*, whole and sole executor of this my last will and testament."

The testatrix died on the 9th day of March 1809. Her son and her three daughters named in her will, and their husbands therein also named, survived her. *John Bryan*, her son, died in 1824. *James Winson*, the husband of her daughter, *Ann Winson*, died in February 1829. In July following, *Ann Winson* married *Joseph Strutt*. *William Dadley*, the husband of the testatrix's daughter, *Mary Dadley*, died in May 1849. *Mary Dadley* did not marry again. She died in April 1850. *Joseph Strutt* and the Petitioner, *William Darnborough*, were the only husbands of the testatrix's daughters who were living at the death of *Mary Dadley*; and *Darnborough* claimed to be entitled to the whole of the testatrix's stock which remained after payment of her debts and legacies, because *Strutt* married *Ann Winson* after the death of the testatrix.

Mr. *Bethell* and Mr. *E. F. Smith*, in support of the petition, cited *Garratt v. Niblock* (b).

Mr. *C. P. Cooper* appeared for the testatrix's personal representative.

(b) 1 Russ. & Myl. 629.

Mr. *Grenside*, for *Joseph Strutt*, said that *Strutt* was the husband of one of the testatrix's daughters named in her will, and that he was living at *Mary Dadley's* decease; and, therefore, he was entitled to a moiety of the stock: that, in *Garratt v. Niblock*, the testator used the expression: "My beloved wife;" which showed that he meant his *then* wife and not an after-taken one: that, under a gift to the children of *A. B.*, after-born children would take: besides, the gift in this case was not immediate, but a gift in remainder, after a life-interest.

1851.
BRYAN'S
TRUST.

Mr. *E. F. Smith*, in reply, said that the testatrix named the husbands of her daughters and referred to her daughters as their wives: and that the gift in question was not a gift to a class, as a gift to children was, but a gift to certain individuals, *nominatim*.

THE VICE-CHANCELLOR:

The case of *Garratt v. Niblock* does not govern this; because the testator there used the expression: "My beloved wife;" which showed that he meant a particular person.

The question, here, is whether the testatrix, when she used the words: "the husbands of my said daughters," had in view a class, or certain individuals. She designates her son as a person who was to share, in the gift, with the husbands of her daughters; and it is evident that she meant not any son of hers who might survive the tenant for life, but her son, *John Bryan*, whom she had before named: and, that being so, the necessary inference is, that, by the words: "the husbands of my said daughters," she meant the persons whom she had before named and described as such, and whom she knew and probably was attached to. Therefore, I am of opinion that Mr.

1851.

BRYAN'S
TRUST.

Darnborough is entitled to the fund in Court, to the exclusion of Mr. *Strutt*.

1851.

12th and 14th
Nov.

Will.

Construction.
Petition.
Costs.

IN THE MATTER OF HAM'S TRUST.
EX PARTE BILES.

Small
WR 271

Testator directed that a sum of stock standing in his name should be divided between and amongst the relations of his late wife, in such manner, shares, and proportions as would have been the case, in case she had died possessed of it, a spinster and intestate. The wife had sixteen next-of-kin living at her death. Five of them died before the testator.

Held that the eleven survivors took only a sixteen each, and that the other five shares lapsed into the residue; and ought to bear the costs of the Petitioners and Respondents.

JOHN HAM executed a bond in the penalty of 1600*l.*, to *Joseph Kingston Warne*, dated the 7th of September 1799: and, after reciting that a marriage was intended shortly to be solemnized between *John Ham* and *Eleanor Biles*; and that it had been agreed, between them, that 800*l.* should be settled and secured in manner and form as thereafter mentioned, namely, that *Ham* should have the use and benefit of the 800*l.* during his life, and that, from and after his decease, *Eleanor Biles* should have the interest of it during her life; and, after both their deaths, that the principal should be divided between the children of their marriage in such manner and proportion as the survivor of them should give, direct or appoint by his or her will, and, in default thereof, to and amongst such children equally, share and share alike; and, in case there should be no child or children of the marriage, then that the 800*l.* should be paid to such person or persons as *Eleanor Biles* should, by her last will and testament in writing (which she was thereby empowered to make notwithstanding her coverture) give, direct, or appoint: the condition of the bond was expressed to be that if *Ham's* heirs, executors, or administrators should pay 800*l.* to *Warne*, his heirs, executors, administrators, or assigns within six calendar months after *Ham's* decease, with interest from his decease, in trust nevertheless for *Eleanor Biles*, if she should be then living, and for her

to receive the interest for her life; and, in case of her death, then in trust to pay the 800*l.* and the growing interest thereof, to and amongst such child or children of *Eleanor Biles* by *Ham*, in such manner and proportion as the survivor of them should, by his or her will, give direct, or appoint; and, in default of such gift, direction or appointment, to and amongst such child or children equally, and, in case of no child, then in trust to pay the 800*l.* and the growing interest thereof, unto such person or persons as *Eleanor Biles* should, by her will, give, direct, or appoint, and, in default of such gift, direction, or appointment, to her executors or administrators; then the bond should be void.

1851.
HAM'S
TRUST.

Eleanor Ham died, in July 1844, intestate, without having made any appointment of the 800*l.* secured by the bond, and without having had any issue. On the 17th of September following, her husband took out letters of administration to her effects. On the 13th of the same month he made his will and, on the same day, a codicil thereto. The codicil was as follows:—

“Memorandum.—Whereas, on my marriage with my late wife, *Eleanor Biles*, I entered into a bond to leave her the sum of 800*l.* on my death, as in the said bond is mentioned; and I intend, shortly, to sell out 6000*l.* stock, part of the sum of 20,000*l.* stock now standing in my name in the Three-and-a-half *per Cent.* Annuities, and to distribute the same, in my lifetime, amongst her relations in such manner as I intend, in lieu of any claims for the said sum of 800*l.* under the said bond. Now I do hereby will and direct that, in case of my death before carrying such my intention into effect, the said sum of 6000*l.* stock shall not be considered as part of my residuary estate, but shall be divided, between and amongst

1851.

HAM'S
TRUST.

*the said relations of my said late wife, in such manner, shares and proportions as would have been the case in case my said late wife had died possessed of the said sum of 6000*l.* stock, a spinster and intestate."*

Mr. *Ham* died on the 15th of February 1849, without having carried the intention expressed in his codicil into effect.

In obedience to an order made on a petition presented by a person who alleged that he was one of the relations and next of kin of Mrs. *Ham*, the *Master* found that the Petitioner and fifteen other persons were the nephews and nieces and next of kin of Mrs. *Ham*, living at her death; and that the petitioner and ten of the fifteen were her next of kin living at her husband's death.

The Petitioner then presented a petition praying that the *Master's* report might be confirmed; and that the Petitioner and the other next of kin living at Mr. *Ham's* death, might be declared to be the parties entitled to the fund in Court which represented the 6000*l.* stock, and that that fund might be equally divided amongst them.

Mr. *Walker* and Mr. *Sandys*, for the Petitioner, and Mr. *Malins*, Mr. *Grove*, and Mr. *Wolstenholme* for the other surviving next of kin of Mrs. *Ham*, contended that a gift to the relations of *A. B.*, was a gift to a class; and that only those members of the class who were living at the period of distribution, that is, at the death of the testator, were entitled under it.

Mr. *Bethell* and Mr. *Giffard*, for the personal representatives of the deceased next of kin of Mrs. *Ham*, said that the words: "in case my said late wife had died pos-

sessed of the said sum of 6000*l.* stock, a spinster and intestate," meant ; " in case my wife had been possessed of the 6000*l.* stock at her death, and had died unmarried and intestate."

1851.
 HAM'S
 TRUST.

Mr. *K. Parker* and Mr. *Milne*, for the residuary legatees under the testator's will, said, first, that the testator, when he made the gift, evidently supposed that he was subject to some liability under the bond ; but, as he was his wife's personal representative, he was subject to no such liability ; and that the gift was void, as having been made under a mistaken notion of liability : secondly, that the gift was void for uncertainty ; for there was nothing to show what relations of his wife the testator meant by the words : " the *said* relations of my late wife," none having been previously specified ; and, lastly, that, if the gift was good, it was a gift to the next of kin of Mrs. *Ham* living at *her* death ; and, therefore, the shares of the five who died before the testator, fell into the residue.

Mr. *Attwood* appeared for the testator's executors.

The following cases were cited. *Doe v. Over* (a), *Lee v. Pain* (b), *Doe v. Sheffield* (c), and *Viner v. Francis* (d).

Mr. *Walker* replied.

The VICE-CHANCELLOR :

The first question is whether the gift in the codicil is

(a) 1 Taunt, 263.

(b) 4 Hare, 201.

(c) 13 East, 526.

(d) 2 Cox, 190.

1851.

HAM'S
TRUST.

void, as having been made on a mistaken supposition of legal liability to a debt.

The testator, certainly, refers to what he calls claims, on the part of his wife's relations, for 800*l.* under the bond: and I admit that that language may be considered to show that he supposed that they had some legal claim upon him. But it is clear that it may refer, and my impression is that it does refer to claims of a very different nature from claims constituting a legal liability. The testator may have thought that his wife's relations had a moral claim to his consideration, in consequence of his having succeeded to property which they would have taken if his wife had survived him and died intestate, or which she might have left to them if she had died testate. It is clear that he had liberal intentions towards her relations; else, why did he give 6000*l.* stock, to satisfy a liability which could not exceed 800*l.*? There is, therefore, no ground for saying that the gift is void, as having been made under an erroneous supposition of legal liability.

The next question is, is it void for uncertainty in the description of the persons to take?

The testator recites that he intended to sell out the 6000*l.* stock, and to distribute the same, in his lifetime, amongst his wife's relations: and, if he had sold it out, he might have done as he pleased with the money; he might have excluded some of his wife's relations, if he thought proper to do so, and might have given the others what he pleased. But he is there speaking of what he intended to do *by some act in his lifetime*. And he afterwards directs what is to done in case he does not do that act in his lifetime. He says: "Now I do, hereby, will

and direct that, in case of my death before carrying such my intention into effect, the said sum of 6000*l.* stock shall not be considered as part of my residuary estate, but shall be divided between and amongst the said relations of my said late wife." When we look back to see who, "the said relations" are, we find they are, "her relations." Therefore, the gift is to be interpreted as if it were a gift of the 6000*l.* to be divided between and amongst, "the relations of my late wife." Now, a gift to the relations of a person named, is not void for uncertainty: it has been, generally, held to be a gift to the next of kin of that person. There may be something else in the will which makes it void for uncertainty; but it is not void of itself.

1851.

HAM'S
TRUST.

Being then of opinion that the gift is not void, either on the ground of mistaken supposition of debt or on the ground of uncertainty, the next point that I shall consider is, what the testator meant by the words: "in case my said late wife had died possessed of the said sum of 6000*l.* stock, a spinster and intestate." It seems to me to be clear that he meant, in case his wife (whom he calls his *late* wife) had been possessed of the 6000*l.* stock at her death, and had died a spinster and intestate.

The next point is this. It is said that the gift is a gift to a class of persons; and that, according to the decided cases, if some of the members of the class die in the interval between the date of the will and the period of distribution, that is, the death of the testator, those who survive take the whole fund: and I admit that that would have been the case here, if the gift had been simply to the relations of the testator's wife. But the testator directs that the stock shall be divided between and amongst the relations, that is, the next of kin, of his wife

1851.

**HAM'S
TRUST.**

in such manner, shares and proportions as would have been the case, in case she had died possessed of it a spinster and intestate. He means, by those words, that the stock shall go to the persons who, at her death, would have been entitled, by law, to her personal estate, in case she had died a spinster and intestate; and that each of those persons shall take, not only in the same manner, but the same share and proportion as he would have taken under the Statute of Distributions.

It appears that the wife, at her death, left sixteen nephews and nieces her next of kin: and, if she had died a spinster and intestate, the manner in which they would have taken her personal estate, would have been as tenants in common, and the shares and proportions in which they would have taken it, would have been sixteenths. But, if I were to hold that the eleven who survived the testator are to take the whole fund among them, they would not take it either in the same manner or in the same shares and proportions as the testator says they are to take it; and, therefore, I should set aside the direction, contained in the codicil, as to the manner, shares and proportions; which I am not at liberty to do.

Taking the whole of the codicil together, my opinion is that the persons to whom the testator gave the 6000*l.* stock under the designation of the relations of his late wife, are her sixteen next of kin who were living at her death, and that it is given to them as tenants in common. The consequence is that the shares of the five who died in the lifetime of the testator, lapsed and belong to the residuary legatees.

After the judgment had been delivered, a discussion arose as to the costs of the petitioner and respondents.

1851.

HAM'S
TRUST.

Mr. *Malins* contended that they ought to be paid out of the testator's residuary personal estate, and cited *In re Sharpe's Trustees* (a).

Mr. *K. Parker* and Mr. *Milne* contended that they ought to be paid out of the fund in Court; and cited *In re Ross's Trust* (b), *In re Bartholomew's Trust* (c), *In re Croyden's Trust* (d).

The *Vice-Chancellor* said that he had no jurisdiction over the residue; indeed, he could not tell whether there was any or not; but he had jurisdiction over the whole of the fund which had been paid into Court; and that, five-sixteenths of that fund having lapsed, he should, in exact accordance with the principles of the Court, direct the costs of all parties to be paid out of those five-sixteenths.

(a) 15 Sim. 470.

(c) 16 Sim. 585.

(b) *Ante*, Vol. I. p. 196.

(d) 19 Law Journ. 172.

Reid & Reid 10th Nov. 1855.

1851 :
7th, 8th and
10th Nov.

Estate tail.
Executory
devise.
Will.

Construction.

IN THE MATTER OF THE WILTS, SOMERSET AND WEYMOUTH RAILWAY COMPANY'S ACT, AND OF THE LANDS CLAUSES CONSOLIDATION ACT, 1845.

EX PARTE MATTHEW DAVIES, THE YOUNGER.

A testator who died in 1833, devised his residuary real and personal estate to his eldest son and his heirs, executors, &c. : provided and his will was that, in case his said son *should die without leaving any lawful issue of his body*, such part of his said residuary estate as was freehold, and situate in certain places, should, *at his death*, be divided into two equal parts ; one of which parts he gave to his second son, and his heirs ; and the other, to his daughter and her heirs.

MATTHEW DAVIES, the elder, by his will dated the 23rd of October, 1832, gave, devised and bequeathed, to his son *Charles*, his messuages, tenements, out-houses, gardens, hereditaments and premises, with the fixtures thereto belonging, in *Warminster*, which he purchased of Mr. *Slade*, and then in his own occupation and in the occupation of Mr. *Lawes* as his tenant ; to hold to his said son, his heirs, executors, administrators, and assigns, subject to the payment of an annuity of 50*l.* to his wife for her life : and he willed that the sum of 1000*l.* settled on his late daughter *Ann*, might be paid, to the trustees named in her marriage settlement, as soon after his death as might be : and, after giving some specific and pecuniary legacies, he gave, devised and bequeathed all the rest, residue and remainder of his monies, securities for money, goods, chattels, effects, property and estate, both real and personal, to his wife, his two sons *Matthew* and *Charles* and his daughter *Frances*, their heirs, executors and administrators,

Held, as to such part of the testator's residuary estate as was freehold and situate in the places named, that his eldest son took, not an estate tail in it, but an estate in fee, with an executory devise over to take effect at his death, in case he should have no issue then living.

1851.

EX PARTE
DAVIES.

upon trust to permit his wife to receive the rents, issues, profits, dividends, interest and income thereof for her life; and, at her death, he gave the sum of 2500*l.*, part of such residuary estate, to his son *Charles*, on condition that he joined in the execution of the trusts of the will and assisted in the management of the testator's affairs; such legacy, nevertheless, to become a vested interest in him at the time of the testator's death. And the testator gave and bequeathed the sum of 4000*l.*, other part of such residuary estate, to his trustees and executors thereafter named, in trust for the separate use of his daughter *Frances*; and, upon her death, he gave the 4000*l.* to her children in such parts, shares and proportions, manner and form, as she should, by any deed or deeds, instrument or instruments in writing to be by her executed and attested as therein mentioned, or by her will duly executed and attested, appoint, give or bequeath the same; and, in default of such appointment, gift or bequest, upon trust to pay the said principal sum of 4000*l.* unto and equally amongst and between all her children who should be living at her death and the issue of any such children or child who might die in her lifetime, and their respective executors, administrators and assigns, as tenants in common (the issue of such children or child, so dying, to take their parents' share only); and, if but one child, then to such only child, his or her executors, administrators or assigns: And he gave the sum of 3000*l.*, other part of such residuary estate, unto and equally amongst and between all the children of his late daughter *Ann*, share and share alike, to be paid them in three months after the decease of his wife: And, as to the remainder of his residuary estate, both real and personal, not thereinbefore disposed of, he gave, devised and bequeathed the same (*subject to the proviso thereafter contained*) to

1851.

EX PARTE
DAVIES.

his son Matthew, his heirs, executors, administrators and assigns, hoping that his children might never meet with the troubles and anxiety of mind which he had undergone, and that they might use their best endeavours to live in love and unity with each other: Provided also, and it was his will that, in case his son, Matthew, should die without leaving any lawful issue of his body, such part of his said residuary estate so given to him as might be in the nature of freehold, situated in Warminster and Westbury, should, at his death, be divided into two equal parts; and he gave, devised and bequeathed one-half of such freehold property to his son Charles, his heirs and assigns, and the other half to his daughter Frances, her heirs and assigns; his son Matthew having it in his power to give sufficient to the children of his late sister Ann, (if he thought proper, but not otherwise) out of the personal estate which he had already had and would have on the death of his mother.

The testator died in September 1833. His widow died in August, 1850.

The question was whether *Matthew Davies*, the son, took an estate-tail, or an estate in fee with an executory devise over, in such parts of the testator's residuary estate, as was freehold and situate in *Warminster* and *Westbury*.

Mr. *Malins* and Mr. *Berkeley*, for *Matthew Davies*, said that the words: "in case my said son, *Matthew*, shall die without leaving any lawful issue of his body," referred to a failure of issue of *Matthew*, whenever it might take place, and cut down the estate in fee given to *Matthew* by the preceding words, to an estate-tail; and that the words, "at his death," which

were subsequently used, made no difference. *Walter v. Drew* (a), *Doe v. Cooper* (b), *Dunk v. Fenner* (c), *Broadhurst v. Morris* (d).

1851.
EX PARTE
DAVIES.

Mr. *Selwyn*, for the testator's daughter, *Frances*, and her husband, contended that *Matthew Davies* took an estate in fee, with an executory devise over, to take effect on his dying without leaving issue living at his death. He cited *Doe v. Frost* (e), *Doe v. Webber* (f), *Lytton v. Lytton* (g), *Nichols v. Hooper* (h), and *Baker v. Tucker* (i). And he distinguished the principal case from the cases cited for *Matthew Davies*, on the following grounds: that the first gift was a gift in fee, and not for life; that the property was given over in case *Matthew* should die without leaving issue; and the gift over was to take effect at his death, and not after his death. He also referred to the words at the end of the proviso: "he, my said son, *Matthew*, having it in his power to give sufficient unto the children of his late sister *Ann*, (if he thinks proper, but not otherwise) out of the personal estate which he has already had and will have on the death of his mother;" and said that those words showed that the testator contemplated, not an indefinite failure of *Matthew's* issue, but a failure of his issue at his death; and that it was immaterial that they referred to personal estate.

Mr. *Malins*, in reply, said that the personal estate was given absolutely to *Matthew*: that the words relied on by

(a) Comyn's Rep. 373.

(b) 1 East, 229.

(c) 2 Russ. & M. 557.

(d) 2 Barn. & Ad. 1.

(e) 3 Barn. & Ald. 546.

(f) 1 Barn. & Ald. 713.

(g) 4 Bro. C. C. 441, see 459.

(h) 1 P. W. 198.

(i) 14 Jurist, 771.

1851.
 EX PARTE
 DAVIES.

Mr. *Selwyn* related, solely, to personal estate; and, therefore, they could not control a proviso which related solely to real estate: that the expression, "at his death," meant, "at his death without issue;" and, in *Broadhurst v. Morris*, the gift over was to take effect in default of issue of *W. Broadhurst*, at his decease; and yet the Court held that *W. Broadhurst* took an estate-tail: that the proviso showed that the testator, when he gave the property to *Matthew and his heirs*, meant his lineal heirs: *Doe v. Ellis* (j).

THE VICE-CHANCELLOR :

The right of *Matthew Davies*, the son, to what he asks by his petition, depends upon the construction to be put upon his father's will; and the question is, whether he takes an estate in fee, with an executory devise to take effect in the event of his dying without issue living at the time of his death, or whether he takes an estate-tail, with a remainder limited upon it.

By the will, the testator, after giving certain specific gifts not material to the present question, devises all the rest, residue, and remainder of his money, securities for money, goods, chattels, and effects, property and estate, both real and personal, to his wife and his two sons, *Matthew* and *Charles*, and his daughter *Frances*, in trust, to permit and suffer his wife to take the rents, &c., during her life; and, at her death, he gives the sum of 2500*l.*, part of his residuary estate, to his son *Charles*, on certain conditions as to executing the trusts of his will and assisting in the management of his affairs. Then he gives another sum of 4000*l.* to his trustees and executors, upon certain trusts for the benefit of his daughter

Frances: and another sum of 3000*l.* among the children of his deceased daughter, *Ann*: and then follows the devise upon which the question immediately turns: "And, as to the remainder of my residuary estate, both real and personal, not hereinbefore disposed of, I give, devise, and bequeath the same (subject to the proviso hereinafter contained), unto my son, *Matthew Davies*, his heirs, executors, administrators, and assigns:" so that, thus far, all the residue, both of the realty and of the personalty, is given to *Matthew Davies*, his heirs, executors, administrators, and assigns. Then comes this proviso: "Provided also, and it is my will that, in case he, my said son, *Matthew*, shall die without leaving any lawful issue of his body, such part of my said residuary estate so given to him as before mentioned as may be in the nature of freehold, situate in *Warminster* aforesaid and *Westbury*, shall, at his death, be divided into two equal parts or shares. One equal half part or share of such freehold property I give, devise, and bequeath unto my said son, *Charles Davies*, his heirs and assigns; and the other half part or share thereof I give, devise, and bequeath unto my said daughter *Frances*, her heirs and assigns." Then he adds this clause, which was called to my attention after I was prepared to give my judgment; and, though I continue of the same opinion as I had then formed, it is still of service, as I shall hereafter show; "He, my said son *Matthew*, having it in his power to give sufficient to the children of his said sister *Ann* (if he thinks proper, but not otherwise), out of the personal estate which he has already had and will have on the death of his mother." The question, as I said before, is whether *Matthew*, in respect of the freehold part of the general residue devised to him, takes an estate in fee with an executory devise to take effect in

1851.

EX PARTE
DAVIES.

1851.

EX PARTE
DAVIES.

the event of his not leaving issue at his death, or an estate-tail?

Now, the general principle applicable to the construction of a will with respect to a question of this sort, is that you are to look at the whole will, to see whether you are satisfied, upon the general effect of it, that the testator, when he speaks of the devisee dying without leaving any lawful issue of his body, is pointing to a failure of issue at the death of the devisee, or to an indefinite failure of issue. In the case before me, there is no question but that, by the first devise, *Matthew Davies* would be tenant in fee of the freehold, as well as absolute owner of the personal property; and, if he is cut down to an estate tail, it is by virtue of the words, "in case my said son shall die without leaving any lawful issue of his body;" and no doubt, according to the law, as it stood before the late Wills Act, those words: "In case he shall die without leaving any lawful issue of his body," would have made him tenant in tail; the word "leaving" being held not to fix the time to his death. But that was not the case with respect to personalty; and, in the case of *Forth v. Chapman* (*k*), those words were held to mean one thing with respect to realty, and to mean a totally different thing with respect to personalty. But I am now to interpret this will according to the law as it stood before the Wills Act, and without reference to that Act at all.

With respect to the cases cited, I will refer to two or three of the principal ones, in order to see how they help us.

(*k*) 1 P. W. 663.

In *Walter v. Drew*, the testator willed that, if *Richard*, his eldest son, should happen to die and leave no issue of his body, then, after the death of *Richard*, he gave his lands of inheritance in a certain place, to *William*, his youngest son, to hold the same, after the death of *Richard*, to him and his heirs. It is to be observed that, in that case, there was no direct devise at all to the eldest son; but the Court held that he took an estate by implication, until he should die and leave no issue of his body; in other words, an estate tail. So that the Court considered that the time of the decease of *Richard* was not pointed out by the testator as the time at which the limitation to *William* was to take effect. We know that it is a rule that a limitation, if it can take effect by way of remainder, shall not take effect by way of executory devise; and the Court there came to the conclusion that there was an estate tail in the eldest son, and an estate in fee in remainder in the youngest son. I do not, however, think that that case at all governs the present.

1851.

EX PARTE
DAVIES.

The case of *Broadhurst v. Morris* was a case sent from a Court of Equity for the opinion of a Court of Law, in a suit for specific performance; and the question was whether the vendor had such an estate as enabled him to make a good title to the purchaser. The devise there was to *William Broadhurst* and his children lawfully begotten for ever. Stopping there, it was decided, and I think rightly, that *William Broadhurst* took an estate tail. But then came this limitation over: "But, in default of such issue at his decease, to *Alexander Bridgok*, his heirs and assigns for ever." Now, that limitation might have been read in two ways, by placing the comma, first before, and then after the words, "at his decease." But no opinion was given as to what estate the devisee over took. The only question

1851.

EX PARTE
DAVIES.

put and answered was what estate the first devisee, *William Broadhurst*, took. The Court may, perhaps, have thought that the devise over was not an executory devise, to take effect in defeasance of the estate-tail, but that it was a contingent remainder, to take effect in the event of the estate-tail determining in a particular mode, namely, by *William Broadhurst* dying without issue living at his death. But, however that may be, that authority does not appear to me to govern this case.

The only other case referred to, which I think it necessary to make any particular observations upon (and I think that it is the most material one), is *Doe v. Frost*.

There, the limitation was to *William Frost* and his heirs for ever; and, in that particular, it resembles this. There was a clear devise in fee to the first taker. Then the limitation over was:—"And, if *William Frost* should have no children, child, or issue, the said estate is, on the decease of the said *William Frost*, to become the property of the heir-at-law, subject to such legacies as he, the said *William Frost*, may leave, by will, to any of the younger branches of the family." Now, the words in that case were, "on the decease." The words in this will, are; "at the decease:" and I confess I do not see any distinction between the two. I ought to have mentioned that the decision in that case, was that *William Frost* took an estate in fee, with an executory devise over to take effect in the event of his dying without leaving children at the time of his decease. It was contended that the ground of that decision was the last clause: "subject to such legacies as he, the said *William Frost*, may leave, by will, to any of the younger branches of the family." But, when I look at the judgments given

by the learned Judges who decided that case, Lord Chief Justice *Abbott*, Mr. Justice *Bayley*, Mr. Justice *Holroyd*, and Mr. Justice *Best*, I find that, with regard to Mr. Justice *Bayley* and Mr. Justice *Holroyd*, each of them gave his judgment that it would be an estate in fee with an executory devise, independently of the clause relating to the giving of legacies. After giving that opinion, Mr. Justice *Bayley* adds that the clause about legacies corroborated the opinion which he had formed. Mr. Justice *Holroyd* decides that the limitation itself, created an estate in fee with an executory devise, and does not refer to that clause, even as corroborating his opinion. He rests his judgment, entirely, on the ground that, having regard to the words used, and, particularly, to the words: "on the decease of the said *William Frost*," the testator intended to give a fee, but a fee so far limited as that, if the devisee died without leaving issue living at his death, then the estate was to go over to some other person. However, Lord Chief Justice *Abbott* refers to the clause in question, and founds his judgment upon it. Mr. Justice *Best* simply stated that he concurred with the other Judges.

1851.

EX PARTE
DAVIES.

Now if, from the will in *Doe v. Frost*, you expunge the clause relating to legacies, I confess I do not see any distinction between the language of the will in that case, and the language of the will now before me: and, therefore, I must conclude, that the Judges who decided *Doe v. Frost*, would, upon this will, have decided, as they did there, that it was an estate in fee with an executory devise over. When I look at this will, I feel quite satisfied that the testator was referring to the period of the death of the devisee, as the period at which he intended, if there was then a failure of *Matthew's* issue, that there should be a devise over.

1851.

EX PARTE
DAVIES.

Now there is, in this will, a clause certainly very different from the clause, relating to the giving of legacies, in *Doe v. Frost*. I collect, from the will itself, that the testator had three children living, and that he had had another child, a daughter, who was dead, leaving children. His eldest son, *Matthew*, his second son, *Charles*, his daughter, *Frances*, and the children of his deceased daughter, *Ann*, are the only members of his family who are at all referred to by his will; and that seems to have been the state of his family.

He has, first of all, given the whole of his real and personal estate to his wife for life. Then, after her death, there are certain sums to be appropriated upon certain trusts for the benefit of different children and their issue; and then he devises all the rest and residue of his property to his son *Matthew*, and in terms which make it an absolute gift. He does not put any limitation upon the absolute quality of the gift of any part of the estate, except a particular real estate, the estate at *Warminster* and *Westbury*; and, as to that, he says that, if *Matthew* shall die without leaving any lawful issue of his body, then it shall, at his death, be divided into two equal parts; and he gives one part to his second son *Charles*, and the other part to his daughter, *Frances*; not giving any share to the children of *Ann*, his deceased daughter. But then he adds this:—"He, my said son, *Matthew*, having it in his power to give sufficient to the children of his late sister *Ann* (if he thinks proper, but not otherwise) out of the personal estate which he has already had and will have on the death of his mother." It is true that he does not point to any legacy in terms: he does not say that *Matthew* shall have it in his power to give *by will*; nor does he point to anything as being given out of the estate which he is devising over. But,

why did he insert that clause at all? He did not insert it for the purpose of giving any additional power to *Matthew*; for he had, already, given the whole personal estate to him, and had not cut down that gift at all. But his object in inserting it was to show that he did not include the children of *Ann* in the devise over, because *Matthew* had it in his power to make such provision for them as he might think fit out of the personal estate: and he may naturally enough have thought that, without his putting *Matthew* under any obligation, *Matthew* would do something for the children of his deceased sister *Ann*.

1851.
EX PARTE
DAVIES.

I wish it to be understood that I do not, in the least, decide this case on the ground of that last clause. Indeed I was prepared to deliver my judgment before that clause was brought to my attention; but it certainly is a matter which influences my mind to a certain extent, in coming to the conclusion that the period to which the testator points as the period at which, by reason of the failure of issue of *Matthew*, the devise over is to take effect, is the precise period of the death of *Matthew*; and that he did not intend it to take effect on an indefinite failure of the issue of *Matthew*.

1851 :
13th Nov.

*Joint-stock
Companies
winding-up
Acts.*

*Liability of the
members of a
joint-stock
company.*

The members of a completely formed joint-stock company, are not liable for the expenses incurred in attempting to form the company, unless they have made themselves liable, either expressly or impliedly, after the complete formation of the company. Therefore, where the charges in a solicitor's bill, for business done, for the company, before its complete formation, could not be distinguished from the charges for business done

subsequently, the Court held that the Master charged with the winding-up of the company, had rightly allowed the bill only as a claim, with liberty to the solicitor to bring such action as he might be advised.

IN THE WINDING-UP OF THE INDEPENDENT ASSURANCE COMPANY.

TERRELL'S CASE.

THE above-mentioned Company was provisionally registered on the 13th of February 1847. Mr. *Terrell*, a solicitor, had done business for the Company prior to that day; and, at a meeting held on the 15th day of May following, at which he was present, he was appointed solicitor to the Company, and it was resolved that no director should be personally liable for the salary of any officer of the Company; and that no officer should obtain payment for his services, until a sufficient sum should be obtained, by the funds of the Company, for that purpose; nevertheless, the first fund which should be formed by the payment of the deposits on the shares to be taken by the directors and others, should be appropriated to the payment of the expenses of the formation of the Company. The deed of settlement was dated the 24th August 1848; and, at a meeting of the directors held on the 4th October 1848, it was resolved that 60*l.* should be paid to Mr. *Terrell*, on account of stamps required for the deed of settlement prior to complete registration. On the 25th October 1848, it was resolved that the provisional appointment of certain members of the board of directors, and of Mr. *Terrell* and certain other officers of the Company, should be confirmed. On the 29th the Company was completely registered. The winding-up order was made on the 3rd of February 1850.

Mr. *Terrell* having delivered his bill for business done for the Company during the whole of the time that he had acted as solicitor to the Company, the *Master* charged with the winding-up of the Company, allowed the bill only as a claim, and gave Mr. *Terrell* liberty to bring such action as he might be advised.

1851.
TERRELL'S
CASE.

Mr. *Malins* and Mr. *W. H. Terrell*, for Mr. *Terrell*, now moved that the *Master's* order might be discharged. They contended that the *Master* ought to have allowed *the whole* of the bill as a debt due from the Company, on the ground that Mr. *Terrell's* appointment had been recognized by the Company after its complete formation. They cited *Cope's case (a)*, and *Prichard's case (b)*.

Mr. *Bethell* and Mr. *Roxburgh* appeared for the official manager, and cited *Lloyd's case (c)*.

THE VICE-CHANCELLOR :

The object of the resolution to which Mr. *Terrell* was privy, was merely to protect the persons who were then endeavouring to form the Company from being personally liable to the officers of the Company; and I have not heard a word that raises a doubt, in my mind, that Mr. *Terrell* is a creditor of the Company for the business done by him for the Company subsequent to the 24th August 1848. But the members of a company, when formed, are not liable to the expenses incurred in forming the company, unless they have, either expressly or impliedly, made themselves liable. There is, however, no sufficient evidence, in this case, to satisfy me that there was any contract, or anything in the nature of a contract,

(a) *Ante*, Vol. I. p. 54.

(b) *Coram Knight Bruce*, V. C., but not reported.

(c) *Ante*, Vol. I. p. 248.

1851.
TERRELL'S
CASE.

that the Company should be liable for the preliminary expenses. Nor, on the other hand, am I satisfied that there are not matters in this case, from which it may be held that there was an implied contract that the Company should be liable for those expenses: I allude to the resolution, of the 4th October 1848, that 60*l.* should be paid, to Mr. *Terrell*, on account of the stamps required for the deed of settlement, and to the resolution of the 25th of that month, that his provisional appointment to be solicitor to the Company should be confirmed. Therefore, if I could distinguish between that portion of the bill as to which I have no doubt that the Company are liable, and that portion of it as to which I am not satisfied of their liability, I should direct the former portion to be taxed, and an action to be brought with respect to the latter. But, as one portion of the bill cannot be distinguished from the other, I think that the *Master* has done rightly in allowing the whole as a claim; and, therefore, I shall not interfere with his order.

Motion refused. The costs of the Official
Manager to be paid out of the estate.

Back to Cases 1148 395.

IN THE MATTER OF SPOONER'S TRUST, *EX PARTE* ISABELLA MOURITZ, WIDOW, AND OTHERS.

THE will of *Thomas Spooner*, dated the 4th of March 1833, was partly as follows :—

“ I direct my executors to lay out and invest the sum of 2000*l.* in their names, in the purchase of Bank Three *per Cent.* Annuities, and to pay the dividends thereof to my cousin, *Mrs. Ann Duncan*, widow, and to her assigns, for the term of her natural life ; and, after her decease, to transfer the annuities so to be purchased unto such person or persons, and in such shares and proportions as my said cousin, *Ann Duncan*, shall, by her will, or any codicil thereto, to be respectively signed in the presence of at least one witness, direct and appoint.”

The testator died on the 2nd of March 1839. His executors, in pursuance of the above direction in his will, invested 2000*l.*, part of his personal estate, in the purchase of 2209*l.* 15*s.* 11*d.*, Consols, in their names, and paid the dividends of the stock to *Mrs. Duncan* during her life. She died on the 26th of August 1850, having made her will, dated the 13th of August 1841, in the following words :—

“ I, *Ann Duncan*, do hereby, in exercise of the powers in this behalf given to me by the will of *Thomas Spooner*, Esq., deceased, dated the 4th day of March 1833, *direct and appoint that the sum of 2000*l.*, in which I have a life interest under such will, and the Bank Annuities upon which the same may be invested, shall, after my de-*

VOL. II. N. S.

1851.
12th Nov.

Wills Act.
Construction.
Appointment.
Power.

A testatrix having a general power of appointment over a sum of stock under the will of *T. S.*, appointed the stock to her sons, *Joseph* and *John* and her other children, equally : and she left any other sum of money or property to which she then was or might thereafter become entitled under the will of *T. S.*, to be divided amongst such of her children as might be living at her death : and she constituted *Joseph* her residuary legatee. *John* died before her.

Held that *Joseph* was entitled to the share of the stock intended for *John*.

1851.

SPooner's
TRUST.

cease, be paid and transferred to my daughters, Isabella Mouritz, widow, Mary Ann Duncan, Rachel Duucan, and Dora Duncan, spinsters, and my sons, John Duncan and the Rev. Joseph Duncan, clerk, share and share alike. And, as to any further or other sum of money, or other property to which I now am or may hereafter become entitled unto under the will of the said late Thomas Spooner, who was my cousin german, I leave to be divided amongst such of my children as may be living at my decease, share and share alike. I hereby nominate, constitute, and appoint my said son, the Rev. Joseph Duncan, and John Woolsey, Esq., executors of this my last will and testament, constituting my said son, the Rev. Joseph Duncan, my residuary legatee."

John Duncan died, without issue, in the testatrix's lifetime. The petition was presented by his brothers and sisters named in their mother's will, stating, amongst other things, that, by the death of *John Duncan* without issue, one-sixth of the 2209*l.* 15*s.* 11*d.* stock, *lapsed and fell into the residue bequeathed to the Petitioner, Joseph Duncan*, and praying that the stock might be sold, and that two-sixths of the proceeds might be paid to *Joseph Duncan*, and one-sixth to each of the other Petitioners.

Joseph's claim to the one-sixth of the stock intended for *John*, was founded on the 27th sect. of the Wills Act, 7 Will. IV. & 1 Vict. c. 26, which enacts that a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an

execution of such power, unless a contrary intention shall appear by the will ; and, in like manner, *a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.*

1851.
 SPOONER'S
 TRUST.

The petition now came on to be heard.

Mr. *Lewin*, in support of it, said that every person was presumed to know the law ; and, therefore, the testatrix must be taken to have known of the 27th sect. of the Wills Act, and consequently to have meant, by constituting *Joseph* her residuary legatee, that he should take the one-sixth of the stock that had lapsed : *Carter v. Taggart (a)*.

Mr. *Chandless*, for the widow and one of the next of kin of the testator (whose residuary personal estate was undisposed of), contended that it appeared, by the will, that the testatrix intended to exclude her residuary legatee from the property which was the subject of her power : for her will showed that she was well aware of the distinction between that property and the property which was the subject of her ownership, and that she intended the one to go in one channel, and the other to go in another channel. He cited *Easum v. Appleford (b)*, and said that *Carter v. Taggart* had no application to the present case.

(a) 16 Sim. 423.

(b) 10 Sim. 274, and 5 Myl.
 & Cr. 56.

1851.
 SPOONER'S
 TRUST.

Mr. *Lewin*, in reply, said that *Easum v. Appleford* supported his case; and he read the following passage in the judgment: "The residuary clause is understood to be intended to embrace everything not otherwise effectually given; because, as Sir *William Grant* expresses it in *Cambridge v. Rous*, the testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee; so that, upon failure of the particular intent, the Court gives effect to the general intent" (c).

The VICE-CHANCELLOR said that the words, "I constitute *A. B.* my residuary legatee," meant the same as, "I give all the rest and residue of my personal estate to *A. B.*:" That, with regard to a testator's own personal property, *A. B.* would take under such a residuary bequest, not only all that the testator had not attempted to dispose of by a particular bequest, but also everything which was the subject of an ineffectual particular bequest, whether such particular bequest failed by lapse or otherwise: That, under the 27th section of the Wills Act, a general residuary bequest operated as an appointment of the personal estate which the testator had power to appoint in any manner he might think proper: That, as a general residuary bequest would operate to pass all the personal estate over which a testator had such power of appointment as well as the testator's own personal estate, there would be an inconsistency in holding that such bequest would pass all that was ineffectually attempted to be specially *bequeathed*, but not that which was ineffectually attempted to be specially *appointed*: That the testatrix, in this case, had not manifested any intention to exclude, from the operation of the

residuary bequest, that which was ineffectually attempted to be specially appointed; and, therefore, *Joseph Duncan* was entitled, as residuary legatee of the testatrix, *Ann Duncan*, to the share of the stock that had lapsed; and an order must be made according to the prayer of the petition.

1851.
SPOONER'S
TRUST.

The Attorney General v. R. P. 163 *Ann Duncan's will*
SOLTAU v. DE HELD.

PREVIOUSLY to 1817, a mansion-house in *Park Road, Clapham*, was divided into two messuages, but without there being any party-wall between them; and, on the 25th of March 1817, the Plaintiff took a lease of one of the messuages for sixty-nine years: and, with the exception of two intervals, he had, ever since, resided in it with his family. The other messuage was occupied as a private residence up to July 1848, when it was purchased by a religious order of Roman Catholics, called "The Redemptorist Fathers;" and they converted the ground-floor into a chapel, and appointed the Defendant, who was a priest of the Roman Catholic church, to officiate in it. In August 1848, the Defendant caused a wooden frame to be erected on the roof of the last-mentioned messuage, and a bell to be hung in it, which was rung, by his direction, five times on Monday, Tuesday, Wednesday, Thursday, and Friday; six times on Saturday, and oftener on Sunday, in every week: the ringing ordinarily commenced at five in the morning, and continued for ten minutes, to the great discomfort and annoyance of the Plaintiff and his family. On the 12th of October 1848, the Plaintiff sent the following letter to the Superiors of the establishment:—"Sir or Sirs: As well on the part of myself and neighbours, as the parish generally, I have to complain of the great annoyance of the bell you have caused to be erected

1851.
9th, 10th, 11th,
and 23rd Dec.

Nuisance.
Bell-ringing.
Injunction.
Pleading.

Injunction granted, after a trial at law, to restrain the ringing of the bells of a Roman Catholic church, so as to occasion any nuisance, disturbance and annoyance to the Plaintiff, who resided very near to the church.

A bill may be filed to restrain a public nuisance, without making the *Attorney-General* a party, if the Plaintiff sustains special damage from the nuisance.

1851.

SOLTAU

v.

DE HELD.

on the roof of your house, and which is loudly tolled as early as five o'clock, and very frequently afterwards, during the morning, afternoon, and evening: we hope, on your receiving this representation, you will take immediate measures to abate this great nuisance, and thereby relieve me and my neighbours *and the rest of the inhabitants of this parish*, from any further disturbance." No answer was returned to that letter; and the ringing being continued, to the great annoyance of the Plaintiff and his neighbours, they, on the 21st December, 1848, (before which time the messuage had been duly certified and registered as a place of religious worship for Roman Catholics (a),) signed the following notice and served it upon Cardinal Wiseman, who exercised ecclesiastical jurisdiction over the Defendant as the priest of the chapel:—"To the Superiors, Directors, Managers, and Occupiers, of the Roman Catholic house and establishment at *Park Road, Clapham*, and to all others whom it may concern: we, the undersigned occupiers of dwelling-houses in the vicinity of the house and establishment above mentioned, desire to represent that we are subjected to a great inconvenience and annoyance from the loud and frequent ringing (often at unreasonable hours) of the large and harsh-sounding bell some time since erected upon an open frame on the roof of the said house. The practice we complain of, is offensive alike to our ears and feelings; disturbs the quiet and comfort of our houses; molests us in our engagements, whether of business, amusement, or devotion; and is peculiarly injurious and distressing when members of our household happen to be invalids: it tends also to depreciate the value of our dwelling-houses. Under these circumstances, we trust you will immediately take

(a) See 31 Geo. III. c. 32, and 2 & 3 Will. IV. c. 115.

the present complaint into your serious consideration, and voluntarily redress the grievance, instead of constraining us to have recourse to the law, to abate what we all, from experience, deem a very grave, indeed, intolerable nuisance." A copy of that notice was served on Mr. *Harting*, the solicitor of the Cardinal and Defendant: and, on the 1st of February 1849, the Plaintiff's solicitor had an interview with Mr. *Harting*, who stated that he had seen the Cardinal and some other persons, on the subject of the notice; and added that the bell was never rung for any but public purposes; namely, purposes interesting to the Catholic population, and not for any household purposes; and that, in deference to the wishes intimated in the Plaintiff's letter of 12th October 1848, the hour of the early bell had been altered from five to six o'clock, and that, willingly, if they could, they would meet the desires of their neighbours still further; but *that* they could not do.

In May 1851, a Roman Catholic church with a steeple, was erected on the ground adjoining the chapel, and was opened on the 14th of that month, and, on that occasion, six bells, which had been placed in the belfry of the steeple, were rung nearly the whole day. The chapel bell was rung at five o'clock and a quarter before seven every morning: the steeple bell,* at a quarter to nine every morning, and a quarter before and a quarter past seven every evening. On 13th May 1851, a peal of six bells was rung several times: on the 14th, the peal continued, at intervals, during the whole day: on Sunday, the 18th, the chapel bell rang at five o'clock, the steeple bell, at a quarter to seven, and again at a quarter to nine. The chapel bell again rang at half-past ten. A peal of chimes was rung at eleven, and, again, at a quarter before one; again at a quarter before six, and again at a quarter be-

1851.
SOLTAU
v.
DE HELD.

* *Sic.*

1851.

SOLTAU

v.

DE HELD.

fore eight. On Saturday the 24th May, the chapel bell rang, as usual, the three times above mentioned, and the steeple bell twice, and, in addition, a peal of the six bells was rung from half-past eight till a quarter to ten at night. On Sunday the 25th May, the chapel bell was rung at two different times, and the steeple bell seven different times. On Monday evening, the 2nd June, a peal of the bells was rung; and, on Saturday the 7th, a peal was rung from a quarter to eight to a quarter to nine. On Saturday the 8th of June, in addition to the ordinary bells, the chimes were rung several times up to nearly nine in the evening. The chapel bell and church bells were, subsequently to 20th of May, rung, daily, upon an average, as great a number of times as they had been rung upon the several occasions before mentioned, down to the time when the Plaintiff obtained a verdict in the action after mentioned.

The bill was filed on the 20th of November 1851, and, after stating as above, it alleged that, when a peal of the church bells was rung, the noise was so great that it was impossible for the Plaintiff, or the members of his family, to read, write, or converse in his house: that the ringing of the chapel bell and church bells was an intolerable nuisance to the Plaintiff, and, if the said bell or bells was or were permitted to be rung in the manner in which the same were so rung as aforesaid, it would be impossible for the Plaintiff to reside, any longer, in his house: that, in consequence of the before-mentioned grievance, the Plaintiff applied to the Defendant, to desist from ringing the said bells or any of them, so as to occasion any annoyance to the Plaintiff; and, the Defendant having refused to comply with that application, the Plaintiff, in June 1851, commenced an action against the Defendant to recover damages for the nuisance committed, to him, by means or

in consequence of the before-mentioned ringing of the said bell or bells: that the action was tried on the 13th August 1851, when a verdict was found for the Plaintiff, with forty shillings damages and costs: that, on the 10th November 1851, judgment in the action was signed, and it remained unreversed.

1851.
SOLTAU
v.
DE HELD.

The bill further alleged that, some time after the commencement of the said action, the chapel bell was removed, from the roof, to one of the sides of the chapel, and, after the 13th August, neither that bell nor the church bells were rung until Sunday the 9th November 1851; when the Defendant caused the church bells to be rung as follows: that is to say, one bell at a quarter before nine in the morning, for five minutes: one bell at twenty minutes past ten, for the like time: three bells at a quarter before eleven, for the like time: one bell at half-past six in the evening, for five minutes, and three bells at ten minutes to seven, for five minutes; and, on Sunday the 16th November 1851, the Defendant caused the said bells to be rung in the same manner and for the same times; and he threatened and intended not only to continue ringing the last-mentioned bells every Sunday in manner last aforesaid; *but also to ring peals of the said six bells, and to ring on week days, and also to ring the chapel bell*; and that the weights and sizes of the said six bells were as follows:—

	cwt.	qrs.	lbs.	Size in diameter.	
				feet	in.
The 6th bell .	9	0	20	3	3
5th „ .	7	3	7	2	11
4th „ .	6	1	3	2	9
3rd „ .	6	0	20	2	7
2nd „ .	4	3	9	2	4
1st „ .	4	1	11	2	3
	38	2	14		

1851.

SOLTAU

v.

DE HELD.

The bill further alleged that the tolling and ringing of the church bells on the 9th and 16th November 1851, caused considerable annoyance to Plaintiff and his family, and, when some of the more weighty of the bells were rung, it was impossible for the Plaintiff to read or converse without great difficulty : That, one of the Plaintiff's daughters being in a delicate state of health, the Plaintiff, during the period that the Defendant caused the church bells to be rung previously to the commencement of the action, was obliged to remove her to some more quiet place of residence ; and, since the verdict and before the commencement of the ringing on the 9th November, the Plaintiff had caused his daughter to be brought back to his house ; but, if the ringing was continued, he should be obliged again to remove her : That the ringing on the 9th and 16th November 1851, was and constituted a nuisance to the Plaintiff ; and, if it was continued, the value of his house would be considerably diminished ; and, if he should be obliged to leave it in consequence of the continuance of the ringing, he should have great difficulty in disposing of it, or would only be able to dispose of it at a considerable pecuniary sacrifice : That, if it were necessary, for the purposes of the performance of the ceremonies practised by persons professing the Roman Catholic religion, that their chapels and churches should have a bell for the purpose of its being rung occasionally ; yet the ringing of peals of bells, or the ringing of bells or a bell for any purpose, religious or otherwise, ought not to be permitted if it occasioned a nuisance or annoyance to any person or persons residing in the neighbourhood ; and that the Plaintiff's bedroom was not more than twenty yards distant from the chapel bell and the church bells.

The bill prayed that the Defendant and all persons acting under his directions or by his authority, might be

restrained from tolling or ringing the chapel bell and the church bells, or any of such bells, and from permitting the said bell and bells, or any of them, to be tolled or rung: or that the Defendant and such persons as aforesaid, might, in like manner, be restrained from tolling or ringing the said bell or bells, or permitting the same or any of them to be tolled or rung, so as to cause or occasion any nuisance or annoyance to the Plaintiff or any of the members of his family residing at his residence in *Park Road, Clapham*.

1851.
SOLTAU
v.
DE HELD.

On the day after the bill was filed, the Plaintiff served the Defendant with notice of a motion that the Defendant and all persons acting under his directions or by his authority, might be restrained from tolling or ringing the chapel bell and the church bells or any of them, or permitting them or any of them to be tolled or rung.

The Defendants put in a general demurrer to the bill, which now came on to be argued.

Mr. *Campbell* and Mr. *Bagshawe*, in support of it, said, first, that the bill stated a case of public nuisance; for it alleged that the ringing of the bells was a nuisance not only to the Plaintiff, but to his neighbours, and, therefore, the suit ought to have been commenced by information, or, at all events, by information and bill, if the Plaintiff was particularly affected by the nuisance: 3 Blackst. Comment. 219, *Iveson v. Moore* (a), Mitf. Plead. 168, *Baines v. Baker*, (b) *Anon.* (c), *Crowder v.*

(a) Com. Rep. 58.

(b) Amb. 158.

(c) 3 Atk. 750. This is

the same case as that reported by Ambler.

1851.
 SOLTAU
 v.
 DE HELD.

Tinkler (d), *Hudson v. Maddison* (e), *The Att.-Gen. v. The Foundling Hospital* (f), *Att.-Gen. v. Nichol* (g), *The Fishmongers' Company v. The East India Company* (h), *The Att.-Gen. v. Johnson* (i), *Squire v. Campbell* (k).

Secondly, that the Plaintiff had not established his right at Law ; and, until he had done so, he had no right to come into Equity for relief ; that it was true that there had been a trial at law, but it had no bearing on the case made by the bill ; for the ringing in respect of which the action was brought, was a ringing on every day of the week, and several times in every day ; it began early and ended late : but the ringing complained of in the bill was a ringing, not of the chapel bell, but of the church bells, and on only one day of the week ; that it commenced at a quarter to nine, and did not last more than twenty-eight minutes in the whole twenty-four hours : Mitf. Plead. 168 *et seq.*, *Lord Teynham v. Herbert* (l), *Anon.* (m), *The Fishmongers' Company v. The East India Company*, *Weller v. Smeaton* (n), *The Att.-Gen. v. Cleaver* (o), *Crowder v. Tinkler*, *Elmhirst v. Spencer* (p) : that, under 31 Geo. III. c. 32, and 2 & 3 Will. IV. c. 115, Roman Catholics were as much entitled to make use of bells for the purposes of religious worship, as the rest of her Majesty's subjects were ; and that the bells of every parish church were rung for a greater length of time than bells of the church in this case were.

(d) 19 Ves. 617 ; see 622.

(e) 12 Sim. 416.

(f) 4 Bro. C. C. 165.

(g) 16 Ves. 338.

(h) 1 Dick, 163.

(i) 2 Wils. C. C. 87.

(k) 1 Myl. & Cr. 459.

(l) 2 Atk. 483.

(m) 2 Ves. sen. 414.

(n) 1 Cox, 102.

(o) 18 Ves. 211.

(p) 2 Macn. & Gord 45.

Mr. *Malins* and Mr. *Tripp*, in support of the bill, said, first, that any individual who was aggrieved by a public nuisance, might institute a suit to restrain it, without making the *Attorney-General* a party: *The Att.-Gen. v. Forbes* (g), *Crowder v. Tinkler* (r), *Spencer v. The London and Birmingham Railway Company*(s), *Sampson v. Smith* (t), *Haines v. Taylor* (u), *Walter v. Selfe* (x). Secondly, that the action was brought and the verdict recovered for ringing the church bells as well as the chapel bell: besides, the bill charged and the demurrer admitted that the Defendant threatened and intended to ring the chapel bell and to ring the church bells *on week-days*; and that the Court had never decided that a bill to restrain a nuisance was *demurrable* because an action had not been brought; though it might, perhaps, refuse to grant the injunction on that ground.

1851.
SOLTAU
v.
DE HELD.

Mr. *Campbell* replied.

The *Vice-Chancellor* said that he was of opinion that the demurrer could not be sustained; but that he should not then state his reasons, lest he should prejudice the argument on the motion, and that, when he had heard the motion, he would give his reasons for overruling the demurrer.

Mr. *Malins* and Mr. *Tripp* then made the motion.

Mr. *Campbell* and Mr. *Bagshawe* opposed it.

- (g) 2 Myl. & Cr. 123. See Judgment.
(r) 19 Ves. 617; see 622.
(s) 8 Sim. 193.
- (t) *Ibid.* 272.
(u) 10 Beav. 75; 2 Phil. 209.
(x) 15 Jurist, 416.

1851.

SOLTAU

v.

DE HELD.

23rd Dec.

The VICE-CHANCELLOR :

This case came before me, in the first instance, by way of demurrer ; and, the demurrer having been overruled, a motion for an injunction was made. I abstained from expressing, at the time, my reasons for overruling the demurrer, from an apprehension that I might intimate some opinion or drop some expression that might prejudice the argument on the motion. I shall now state my reasons for overruling the demurrer, and then I shall give my opinion on the motion.

The demurrer is a general demurrer for want of equity ; and, of course, by that demurrer, the Defendant undertakes to show that, upon the statements contained in the bill, the Plaintiff would not be entitled to any relief at the hearing of the Cause.

The statements of the bill are as follows, &c. &c. &c.

The first ground of demurrer to this bill is that the nuisance complained of is a public nuisance ; and, therefore, the suit should have been instituted by the *Attorney-General* ; and that it is not competent to the Plaintiff to file a bill respecting it.

With regard to that ground of demurrer, my opinion is that it is extremely questionable (to say the least) whether this is a public nuisance at all. But, in the view which I take of the case, it is scarcely, if at all, necessary to consider whether it be or be not a public nuisance. I entertain, however, very great doubt whether it be a public nuisance. I conceive that, to constitute a public nuisance, the thing must be such as, in its nature or its consequences, is a nuisance—an injury or a damage, to all persons who come within the sphere of its operation, though it may be so in a greater degree to

some, than it is to others. For example, take the case of the operations of a manufactory, in the course of which operations volumes of noxious smoke, or of poisonous effluvia, are emitted. To all persons who are at all within the reach of those operations, it is more or less objectionable, more or less a nuisance in the popular sense of the term. It is true that, to those who are nearer to it, it may be a greater nuisance, a greater inconvenience than it is to those who are more remote from it; but, still, to all who are at all within the reach of it, it is more or less a nuisance or an inconvenience. Take another ordinary case, perhaps the most ordinary case of a public nuisance, the stopping of the king's highway: that is a nuisance to all who may have occasion to travel that highway. It may be a much greater nuisance to a person who has to travel it every day of his life, than it is to a person who has to travel it only once a year, or once in five years: but it is more or less a nuisance to every one who has occasion to use it. If, however, the thing complained of is such that it is a great nuisance to those who are more immediately within the sphere of its operations, but is no nuisance or inconvenience whatever, or is even advantageous or pleasurable to those who are more removed from it, there, I conceive, it does not come within the meaning of the term public nuisance. The case before me is a case in point. A peal of bells may be, and no doubt is an extreme nuisance, and, perhaps, an intolerable nuisance to a person who lives within a very few feet or yards of them; but, to a person who lives at a distance from them, although he is within the reach of their sound, so far from its being a nuisance or an inconvenience, it may be a positive pleasure; for I cannot assent to the proposition of the Plaintiff's Counsel that, in all circumstances and under all conditions, the sound of bells must be a nuisance. And it

1851.

SOLTAU

v.

DE HELD.

1851.

SOLTAU

v.

DE HELD.

is rather curious that one of the witnesses who was examined on the trial on the part of the Plaintiff, and who deposed, strongly, to the bells being an intolerable nuisance when he was in Mr. *Soltau's* house, says: "But, where I live at *Clapham*, which is about a furlong from the bells and with the intervention of trees, so far from their being a nuisance to me, they are a positive gratification; and I confess I should be extremely sorry if they were done away with." I mention *that* only by way of illustrating that, in this case, to some persons who live within the sound of these bells, they may be no nuisance at all; and, no doubt, are none; and, therefore, I very much doubt, indeed, my opinion is that the nuisance complained of in this case, could not be indicted as a public nuisance.

But, as I have said, it is of very little moment in the view I take of this case, whether the thing complained of be or be not a public nuisance. I may further make this observation, that it does not follow, because a thing complained of is a nuisance to several individuals, that, therefore, it is a public nuisance. One may illustrate that, very simply, by supposing the case of a man building up a wall which has the effect of darkening the ancient lights of half a dozen different dwelling-houses. It does not follow that, because half a dozen persons or a dozen persons are suffering by the darkening of their ancient lights by the one act, that, therefore, it is a public nuisance which can be indicted at the suit of the Crown, or for which the *Attorney-General* can file an information in this Court. It is a private nuisance to each of the several individuals aggrieved. However, in my further observations on this ground of demurrer, I will proceed on the assumption that it is a public nuisance; that is to say, that the Defendant is right in his contention that it is a

public nuisance, and let us see what the consequence will be if it be so. Now, in the case of a public nuisance, the remedy at Law, is indictment; the remedy in Equity, is information at the suit of the *Attorney-General*. In the case of private nuisance, the remedy at Law, is action; the remedy in Equity, is bill. And this is the distinction which is pointed out in those passages cited, by Mr. *Campbell*, from the 3rd vol. of Blackstone's Commentaries and from Mitford's Treatise on Pleading. But it is clear that that which is a public nuisance, may be also a private nuisance to a particular individual, by inflicting on him some special or particular damage: and, if it be both, that is, if it be, in its nature, a public nuisance, and, at the same time, does inflict, on a particular individual, a special and particular damage, may not that individual have his private remedy at Law, by action, or, in Equity, by bill? That is the question which is to be determined with respect to this ground of demurrer. The Defendant's Counsel insist that he cannot; and several cases were cited in support of that proposition. But, on referring to those cases, it appears to me that they do not support that proposition.

In *Iveson v. Moore*, the case which was first cited and which is a very important one, the Judges of the King's Bench were divided in opinion: but the Counsel who cited that case considered that they had the authority of Lord *Holt*, (a very high authority,) for the proposition that an individual could not maintain an action at law for the damage to himself, where the subject of the action, was a public nuisance. Now, on examining the case, so far from supporting that proposition, it proves directly the contrary. I think it right to refer to the details of that case, rather par-

VOL. II. N. S.

1851.
SOLTAU
v.
DE HELD.

1851.

SOLTAU

v.

DE HELD.

ticularly. It is reported not only in Comyn, but much more fully in the first vol. of Lord Raymond's Reports (y). There the Plaintiff and Defendant were the owners of two adjoining collieries, and the action was an action on the case, and the declaration alleged that the Plaintiff had dug, from his own colliery, a considerable quantity of coals which he had for sale; and that the Defendant, in order to alienate and seduce customers and buyers from the Plaintiff's colliery and to appropriate those customers and procure them to go to his own colliery, stopped up a certain place in, through and over which the highway led; and that it continued so stopped up for a month; so that the carts for conveying the Plaintiff's coals could not pass that way. Now, so far, that was a public nuisance. But then the declaration went on, and alleged the special damage *per quod* the Plaintiff, during all that time, lost the benefit and profit of his colliery; and his coals dug out of his said colliery: "*magnopere deteriorati et depreiati devenerunt pro defectu emptorum, ex causâ prædictâ, sic impeditorum et obstructorum.*" That was the way in which he laid the special damage to himself. The jury found a verdict for the Plaintiff; and it was moved, in arrest of judgment, that the action could not be sustained; and a rule was obtained to show cause why the judgment should not be entered for the Defendant instead of the Plaintiff. The Judges of the Court of King's Bench were equally divided in opinion as to whether judgment ought to be for the Plaintiff or for the Defendant. *Gould* and *Turton* thought that judgment should be for the Plaintiff. *Rokeby* and *Holt* were of the contrary opinion, and thought judgment should be for the Defendant. But why? Not because

1851.
 SOLTAU
 v.
 DE HELD.

either of them entertained the least doubt as to whether an individual could (although it was a public nuisance) maintain an action for a special damage to himself; but because they considered that the special damage was not laid, in the declaration, with sufficient accuracy and minuteness; and only on that ground. *Rokeby*, who coincided with *Holt*, expressed himself distinctly, and begins his judgment with the very proposition which is against the contention of the Plaintiff. He said that he would admit that no particular person could have an action for the general stopping of a way; first, because the offender is punishable at the King's suit; secondly, because multiplicity of actions is to be avoided; and if one man may have an action, for the same reason, one hundred thousand may. But: "*If the stopping be a particular damage to a particular person, he may have an action*"; but then the particular and special damage must be particularly and certainly alleged; which is wanting in this action, and therefore it does not lie." So *Holt*, in the same way, gives his reasons at great length. He considers, first, the question whether an action would lie for the mere stopping the way, on the ground that the Plaintiff's coal mine was situate near to the highway. He says no; it is a public nuisance. Secondly, he considers whether there ought not to be, further, some special damage to support the action, and whether this damage is specially enough shown. So it is clear that both he and *Rokeby* concurred, with the other Judges, in opinion that the action would lie, provided the *per quod* in the declaration laid the special damage with sufficient accuracy and particularity. But, when I look at *Holt's* own report of the case (*z*), it is put beyond all question: he concludes by mentioning this as

(*z*) *Holt's* Rep. 16.

1851.

SOLTAU

v.

DE HELD.

the result of the whole case. He says: "In this case it was agreed, by the whole Court, that, where an action arises from a public nuisance, there must be a special damage; for he that did the nuisance is punishable, at the suit of the public, by indictment or information; and, to allow all private persons their actions without special damage, would create an infinite multiplicity of suits." And, further than this, it appears, by the note which is appended to the report in Lord *Raymond*, that the case was re-argued before the four Judges of the Common Pleas and the four Barons of the Exchequer, and that the eight were unanimously of opinion that the action lay, and that the special damage was sufficiently laid, and that judgment should be for the Plaintiff. That case appears to be one of no slight importance. It was the opinion of all the twelve Judges at that time, with Lord *Holt* at their head, that, in a case beyond all question a case of public nuisance, a particular individual may have an action for a damage sustained, provided he lays that damage with sufficient particularity in his declaration, and of course proves it by sufficient evidence. Therefore, that case, so far from establishing the proposition contended for by the Defendant, establishes the direct contrary.

Another case cited was *Baines v. Baker*, reported by *Ambler* and also by *Atkyns*. It was a bill to restrain the erection of the Small-pox Hospital in *Cold Bath Fields*. Both the reports are jejune; and, unfortunately, there is no trace of the facts of the case in the *Registrar's* book. It appears, as far as one can collect from the reports of the case, which are very unsatisfactory, that the intended erection of the Small-pox Hospital spread dismay and terror through the neighbourhood; and that the Plaintiff was the owner of some houses in *Cold*

Bath Fields, and that his tenants (it does not appear that he himself resided there) were giving him notice to quit their houses. That was the only way in which any special damage was alleged at all, as far as I can collect. But the *Lord Chancellor*, Lord *Hardwicke*, decided that the hospital was not a private nuisance; and doubted whether it was a public nuisance; and he refused the injunction. But I cannot collect that he expressed any opinion that, if it had been a public nuisance and special damage arose to the Plaintiff from it, the Plaintiff might not come into a Court of Equity to restrain that nuisance.

1851.
 SOLTAU
 v.
 DE HELD.

Another case cited, was the case of the *Attorney-General v. The Foundling Hospital*; but it has nothing to do with either public nuisance or private nuisance. It was only the case of an information filed by the *Attorney-General* on behalf of the charity, the Foundling Hospital, to restrain the persons who had the management of that Hospital from dealing with the charity property, by building upon it in a way that was alleged to be a breach of trust and a mismanagement of the property. It was not a case of nuisance at all.

The Fishmongers' Company v. The East India Company shows only that the Fishmongers' Company could maintain a bill for an injunction to restrain the Defendants, the *East India Company*, another corporation, from building a wall so as to darken their ancient lights; but the injunction was refused, because the distance of the wall complained of from the Plaintiffs' lights was so great that it was considered not to amount to a nuisance.

The Attorney-General v. Nichol was a suit on behalf of a charity; and, on that account, and not on the

1851.

SOLTAU

v.

DE HELD.

ground of public nuisance, an information was filed by the *Attorney-General*.

In *Crowder v. Tinkler* the bill was filed, by a private individual, to restrain the erection of a corning-mill, for the manufacture of gunpowder, near to his premises, on the ground that it would endanger the safety of his property: and the *Lord Chancellor* directed the Plaintiff to indict the building as a nuisance, that is, as a public nuisance; and, in the mean time, he put the Defendant on terms as to how he should use the mill, with liberty to apply on the result of the trial. That case is against the proposition contended for by the Defendant; because there the nuisance was a public nuisance; yet Lord *Eldon* sustained the bill.

Hudson v. Maddison was the case of five persons joining together to complain of an act which was a separate nuisance to each of them: and all that was decided in that case was that the five could not sue together.

Squire v. Campbell was the case of the erection of the statue of *George the Third* near *Pall Mall East*; and the *Attorney-General* was made a Defendant to the suit, not in respect of nuisance, but because the freehold of the ground on which the statue was erected was in the Crown.

The Attorney-General v. Cleaver was the case of a public nuisance; and there an information was filed by the *Attorney-General*. But that proves nothing. It only shows that, where the object is to restrain a public nuisance, an information must be filed. It does not at all show that an individual may not file a bill, if he can show special damage arising to himself out of a public nuisance.

These are the cases cited in support of the proposition that the bill will not lie.

1851.
SOLTAU
v.
DE HELD.

Several cases have been referred to on the part of the Plaintiff; such as *Spencer v. The London and Birmingham Railway Company*, *Sampson v. Smith*, *Haines v. Taylor*, and *Walter v. Selfe*, in all of which it was held that, if an individual sustains a special and particular damage from an act, he may have the interference of the Court on a bill, although the act complained of be, in its nature, a public nuisance. Two other cases were cited: *The Attorney-General v. Forbes*, and *The Attorney-General v. Johnson*. Those cases show only that there may be both an information and bill; that is, that the *Attorney-General* may file an information to restrain the act complained of as a public nuisance, and that an individual who sustains a particular injury may join as Plaintiff as well as Relator, and have the remedy for himself also in the same suit. I am of opinion, therefore, that the first ground of demurrer is not tenable.

The next ground insisted upon in support of the demurrer, was that the Plaintiff had not established his right at law. Now, it is true that Equity will only interfere, in case of nuisance, where the thing complained of is a nuisance at law: there is no such thing as an equitable nuisance: but it is no ground of demurrer that the matter has not been tried at law. It very often is a ground for refusing an injunction; but it is not ground of demurrer, as appears from *Berkley v. Ryder*, 2 Vesey, sen., p. 533, and from Lord Cottenham's judgment in *Elmshirst v. Spencer*, where his Lordship expresses himself thus: "The Plaintiff, before he can ask for the injunction, must prove that he has sustained such a substantial injury, by the acts of the Defendant, as would

1851.

SOLTAU

v.

DE HELD.

have entitled him to a verdict at law, in an action for damages." And then, in another part of the same judgment, he says: "This Court will not take upon itself to adjudicate upon the question whether this is a nuisance or not: that must be ascertained in a Court of Law, as laid down by Lord *Eldon* in *The Attorney-General v. Cleaver*." Now, in *The Attorney-General v. Cleaver*, which was a case of public nuisance, Lord *Eldon* directed the indictment, which had been already brought and was pending, to be prosecuted, and ordered the motion to stand over until the hearing of it. Therefore Lord *Cottenham*, in that case, is referring to this; that you cannot ask for the injunction if there be a question about its being a nuisance at law. But I do not know where it is laid down that a bill will not lie, that is, that it is ground of demurrer because the action has not yet been brought. However, whether that be so or not, the Plaintiff in this case has brought his action at law, and obtained a verdict.

Then this ingenious argument was adduced. It was said: "There has been an action at law; but what is now being done, and which you call a nuisance, has never been tried at law. When the trial took place we were ringing every day in the week: we were beginning at five o'clock in the morning, and we were ringing a considerable period of time on each occasion: but now we ring only on Sundays. We ring a fewer number of times, and do not ring so long at a time. Therefore you must bring your action for this, and try whether this is a nuisance." If that argument were to prevail, see what it would come to. Supposing that, after the trial of the action, the Defendant, instead of ringing seven days in the week, had rung six; or, instead of beginning at five o'clock in the morning, had begun at six; or, in-

stead of ringing for a quarter of an hour, had rung ten minutes each time; and, when the Plaintiff came into Equity to restrain him, he had said: "You have not tried this. When you brought your action, I rang seven days in the week. I ring only six now. I began at five o'clock: I now begin at six in the morning." If that were yielded to, and another action brought and damages recovered, the Defendant would reduce the number of days' ringing from six to five, and say you have not tried this; and so on *toties quoties*. It is clear the argument, if pushed to its full extent, must result in that which is contrary to all reason and to all justice. The questions to be tried were, whether the Plaintiff's right in his house was such as to entitle him to come for relief at all, and whether the ringing of the bells was in its nature, a nuisance at law. Both those questions have been tried; but the exact extent or *quantum* of injury or nuisance inflicted, need not be ascertained. Besides, the whole argument upon this ground is put an end to by an allegation in the bill, which the demurrer, of course, admits to be true; "that the Defendant threatens and intends, not only to continue tolling or ringing the last-mentioned bells every Sunday in the manner last aforesaid; but he also threatens and intends to ring peals of the said six bells, and also to toll and ring, on week days; and he also threatens and intends to toll and ring the bell of the before-mentioned chapel or religious house." Therefore, upon this demurrer, it is quite clear that the argument that the Plaintiff has not established his right at law, cannot be maintained.

There was one point raised by the Plaintiff which I do not think it necessary to go into. The plaintiff insisted that it was illegal for Roman Catholics to ring and toll bells in a steeple annexed to their place of worship.

1851.
SOLTAU
v.
DE HELD.

1851.

SOLTAU

v.

DE HELD.

It appears to me that whether that be so or not, is perfectly immaterial to this case; because, if it be illegal, I am not to grant an injunction to restrain an illegal act merely because it is illegal. I could not grant an injunction to restrain a man from smuggling, which is an illegal act. If it be illegal, the illegality of it is no ground for my interfering. Therefore, I do not at all go into the question, whether, under the numerous Acts of Parliament relating to Roman Catholics, it be or be not now lawful to have a steeple and bells. For the reasons which I have mentioned, I overrule the demurrer.

*Judgment on
the motion.*

I now proceed to give my opinion with regard to the motion. And many of the observations which I have made upon the demurrer, necessarily apply, more or less, to the motion: for I find that the facts alleged by the bill are verified by affidavit. I have already stated those facts, and, therefore, I need not repeat them. But I must observe that the six bells in the steeple of the church, are not, in respect of size, such as are used in most chapels and district churches in and near *London*: but they are unusually large bells; and the effect produced by ringing them is thus described by Mr. *Soltau* in his affidavit: He says, "That, when a peal of the bells of the said Roman Catholic church was rung, the noise was so great that it was impossible for me or the members of my family, to read, write, or converse in my dwelling-house: And I further say that the tolling and ringing of the said bell and bells, was and is an intolerable nuisance to me; and, if the said bell or bells is or are permitted to be tolled or rung in the manner in which the same was so tolled and rung as aforesaid, it will be impossible for me to continue to reside, any longer, in my said house." That is the description of the effect produced by the ringing of the bells as it was

practised antecedently to the trial in August last. It appears that the chapel bell has been since removed from the top of the building to the side furthest from the Plaintiff's house. The affidavit then describes the effect of the ringing which took place on the 9th and 16th November last, that is, as it is now practised: "And I further say that the tolling and ringing of the said bells of the said Roman Catholic church in the manner in which they were so tolled and rung on the said 9th day of November instant and 16th day of November instant, caused considerable annoyance to myself, and disturbed the devotions of the members of my family; and that, during the time or times when some of the more weighty of the said bells are rung or tolled, it is impossible for me to read or converse without great difficulty." Then he mentions the fact of his daughter having been removed from the house, which I do not dwell upon, and he proceeds thus: "And I further say that the tolling and ringing of the said bells on the said 9th and 16th days of November 1851, was a great annoyance and nuisance to me and my family; and I further say that, if the said bells of the said church are permitted to be tolled and rung in the manner in which they were so tolled and rung on the 9th and 16th days of November as aforesaid, the value of my said dwelling-house and premises will be considerably diminished, and that if I and my family are compelled to leave, I could only dispose of it at a great pecuniary sacrifice; and I further say that the distance of my bedroom from the bell of the said chapel and the bells of the said church, does not exceed twenty yards." There is another affidavit, that of Mr. *Gadsden*, in support of the Plaintiff's case, which thus states the nuisance as it exists according to the present practice of ringing: "I further say that I have heard the said bells, as they now ring and toll since the 13th August,

1851.

SOLTAU

a

DE HELD.

1851.

SOLTAU

v.

DE HELD.

when I was in the Plaintiff's residence, on the 30th November now last past;" that 30th November being a Sunday; "and I consider the ringing and tolling of the said bells, both as they were rung and tolled, prior to the 13th day of August 1851, and as they are now rung and tolled, to be peculiarly annoying and distressing to any person occupying the said residence of the said Plaintiff; and, in my opinion, the value thereof is greatly decreased by reason of such ringing and tolling." Then he goes on to state: "That, if the said bells were not rung and tolled as aforesaid, in my opinion, the said house would still let for 130*l. per annum*, the rent which I am informed the said Plaintiff now pays for it; and I say that I consider, from the peculiar position of the said church with reference to the Plaintiff's residence, that any ringing or tolling the bells of the said church, even on a Sunday only, as they are now rung and tolled, would have the effect of deteriorating the value thereof; because I do not believe any private gentleman or lady or person who could afford to pay such a rent, would become a tenant thereof." That is the account given of the effect of the present nuisance. Now it struck me, at the time when the motion was made, that more persons ought to have been brought forward to depose to the fact of the nuisance. But, when I consider that, in fact, there is no controversy about it, and that there is no contradictory evidence, I think that the plaintiff was perfectly justified in not producing any further evidence than his own affidavit and the affidavit of one disinterested person. It is not, however, quite correct to say that there is no controversy about the nuisance; for there is an affidavit on the part of the defendant, made by Mr. *Wright*, a builder and house agent at *Clapham*, who says: "I live near the church in the pleadings mentioned and within full hearing of the bells

in the pleadings also mentioned; and I say that I do not consider them any nuisance; and I say that I know, from frequent communication with my neighbours, that the said bells are not considered a nuisance to persons generally." And then he adds this: "and I say that the four Protestant churches in *Clapham*, have and use bells which ring several times, for half an hour at a time, on Sundays, and twice on Wednesdays and Fridays, besides frequent ringings, during the day, for deaths and funerals." That is the only affidavit which at all contradicts the fact of this being a nuisance: but what does it amount to? This gentleman says: "I live near the church." The question is how near? He says; I live within full hearing of the bells;" yes, but how near to the bells? He says that his neighbours do not consider them a nuisance. But where do those neighbours live? How near to the bells? It really comes round to what I observed upon the demurrer, that the ringing of these bells, is a great nuisance to a person living as near as the Plaintiff does, but is not only no nuisance, but may be a cause of pleasurable sensations to those who live further off: and, as Mr. *Wright* has not thought fit to tell me how near he lives to the church, I am left to conjecture: it may be 50 yards, 100 yards, 500 yards, or 1000 yards; and although he may live sufficiently near to the church to hear the bells, yet he may hear them in a way which may be gratifying, or, at all events not annoying. So, also, with respect to the neighbours: we have no means of knowing who those neighbours are, or how near they live. All that we are told is that they do not consider the ringing a nuisance. Therefore I consider the fact of its being a nuisance, sufficiently established by the affidavits which have been made by and on the part of the Plaintiff. Moreover one ought to take into consideration the actual circumstances proved and not at all disputed,

1851.

SOLTAU

v.

DE HELD.

1851.

SOLTAU

v.

DE HELD.

namely, that these bells are of a most unusual weight, and size; that they are placed in a steeple which is almost in front of the Plaintiff's house; and in a place which was the court-yard of the mansion-house, before it was divided into two houses. When you consider those circumstances, it is hardly necessary to produce affidavits to show that it must be an intolerable nuisance to have such large bells ringing, though for a short period of time and only on Sundays, so near to the Plaintiff's house: and it is to be remembered that the Plaintiff has not gone to the bells, but the bells have come to him. Then I may further observe, in connection with this point, that the Plaintiff swears that he is informed and believes that the Defendant threatens and intends not only to continue tolling or ringing the last-mentioned bells every Sunday, in manner last aforesaid, but also to ring peals of the said six bells; and also to toll and ring on week days, and also to toll and ring the bell of the chapel: and there is no contradiction to that; and therefore I must take it that there is the intention, or, at all events, the reservation of the right, on the part of the Defendant, to ring as much as he pleases.

Then it is said that part of what is alleged, by the Plaintiff, as the mischief arising to him, is the diminution in value of his house; and it is said, and with perfect truth, by the Defendant's Counsel, that diminution in value does not constitute nuisance, and is no ground for the Court's interfering. But, although it is perfectly true that mere diminution of value does not, *per se*, constitute nuisance, yet, surely the extent of the nuisance, if it be a nuisance, may be materially shown by this; that so great is the nuisance that no person who can afford to live in such a house as the Plaintiff's, would take it with such a nuisance; and the only person who could be

expected to take it, would be one who would pay only a very small rent, and to whom it was a great object to have a very large house at a very small rent, and who would bear with the nuisance for the sake of the small rent which he paid. I say, in that way, the diminution of value is of very great moment, not as constituting a nuisance, but as an *indicium* of the extent of the nuisance.

1851. ·
 SOLTAW
 v.
 DE HELD.

Under those circumstances the question that I have to determine is a question which I cannot do better than state in the language of Vice-Chancellor *Knight Bruce*, when he decided the case of *Walter v. Selfe*. He says: "The important point next for decision may properly, I conceive, be thus put: Ought this inconvenience to be considered, in fact, as more than fanciful, or as one of mere delicacy or fastidiousness; as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living; but according to plain, sober and simple notions among the English people?" That, I think, enunciates distinctly the question which is to be tried upon such an occasion as this; and I must add, in the very words of Vice-Chancellor *Knight Bruce*, that I am of opinion that this point is against the Defendant; that this is such an inconvenience, and such an invasion of the domestic comfort and enjoyment of a man's home, that he is entitled to come and ask this Court to interfere. And, upon that point, I will just refer to the language of Lord *Eldon*, in the case of *The Attorney-General v. Nichol*. He says: "The foundation of this jurisdiction," (that is, interfering by injunction) "is that head of mischief alluded to by Lord *Hardwicke*; that sort of material injury to the comfort of the existence of those who dwell in a

1851.

SOLTAU

v.

DE HELD.

neighbouring house, requiring the application of a power to prevent, as well as remedy, an evil for which damages, more or less, would be given in an action at law." That is the ground for interference by injunction, and that is the ground upon which, I conceive, that I ought to grant an injunction in this case.

Before I conclude I will just make an observation upon a point which was raised by the Defendant's Counsel: namely, that these bells are no more a nuisance than the bells of a parish church are. It is said that, in this parish, there are four parochial district churches or parish churches; they have all their bells; they ring on Sundays; and they ring on Wednesdays and Fridays; and, if this be a nuisance, why is not that a nuisance, or, if that be not a nuisance, why is this a nuisance? Now it seems to be overlooked that the building to which these bells are attached, although called a church by those who have erected it and those who use it, is not a church in the eye of the law. It is no more a church than the chapel or meeting-house of any denomination of Protestant Dissenters is. A church, in law, is that building of which there is but one in the parish, or but one in the parochial district, where the parish has been divided by Act of Parliament. It is a building the freehold of which and of the yard attached to it, is vested in the parson of the parish; and of which there are churchwardens; to which bells are an appendage recognized by law; the special property in which bells, is, by law, vested in the churchwardens, but for the benefit of the parishioners at large, and, in respect of which bells, it has been held that an action of trover will lie by a succeeding churchwarden, in his official capacity, against the retiring churchwarden, to recover the value of the bells, on the ground of the special property vested by law in the church-

wardens ; and in which action the property must be laid as being the property of the parishioners. The law recognizes the bells as an appendage to a parish church, and, by law, the churchwardens are to have the custody and care of the belfry in which the bells are suspended and tolled. Moreover, with regard to churches, unless in special cases of churches founded by the Crown, or special cases of churches founded by Act of Parliament, not parish churches, they are under the jurisdiction of the Bishop of the Diocese. There is but one Bishop of the Diocese. Is it said that this building is under the jurisdiction of the Bishop of *Winchester*, in whose diocese *Clapham* is situated? Certainly not: it is but a chapel; it is no church; it has no legal privilege of having bells in the same way as a parish church has. I do not mean, in what I say, to intimate, in the slightest degree, that it is unlawful for Roman Catholics to have bells attached to their places of worship. I avoid that question entirely, as I have hitherto done. But it seems to be assumed that this church stands on the footing of a parish church, and, therefore, that it is as much privileged and entitled to have bells, whether they are a nuisance or not, as a parish church is: and, for that reason I have made these observations.

There has been no acquiescence in this case. The Plaintiff has diligently asserted his rights: and I think that he is entitled to an injunction; but not quite in the terms in which it is asked by the notice of motion. The bill asks for an injunction to restrain the ringing of these bells altogether; or, in the alternative, to restrain the ringing of them so as to cause or occasion any nuisance or annoyance to the Plaintiff or any of the members of his family residing in his house: and it appears to me that the latter is very nearly the form in which

1851.
SOLTAU
v.
DE HELD.

the injunction ought to be granted. Therefore I shall order an injunction to issue to restrain the Defendant and all persons acting under his direction or by his authority, from tolling or ringing the bells in the Plaintiff's bill mentioned or any of them, so as to occasion any nuisance, disturbance and annoyance to the Plaintiff and his family residing in his dwelling-house in the bill mentioned. In thus wording the injunction, I am following what was done, by Vice-Chancellor *Knight Bruce*, in *Walter v. Selfe*.

I cannot say that it is absolutely impossible that any one of these bells may not be rung so as not to occasion any nuisance or annoyance to the Plaintiff. It is possible: and, therefore I do not think it right to say that
(none of the bells shall be rung again.

WOOD v. SUTCLIFFE.

FOR above twenty years, the Plaintiffs had carried on the business of worsted-spinners, at mills situate on the banks of a beck or stream in *Yorkshire*, called *The Bowling Beck*, and, by long user, had acquired the right of using the water of the stream for washing wool and generating and condensing steam; the first two of which purposes required that the water of the stream should come pure and unpolluted to their mills. The Defendants were the proprietors of works situate higher up the stream, at which they carried on the business of dyers; but the construction of those works was not begun until the year 1844, nor did the Defendants commence business in them until February in the following year. At different times between the erection of the Plaintiffs' mills and the construction of the Defendants' works, about sixteen hundred houses, forming a suburb to the town of *Bradford*, were built on or near to the banks of the stream, between the Plaintiffs' mills and the Defendants' works. In January, 1850, the Plaintiffs brought an action, and in July following obtained a verdict, but with only a farthing damages, against the Defendants, for having polluted the stream by pouring the refuse of the matters used in their business into a drain communicating with the stream. At the trial of the action, the Defendants did not dispute the right of the Plaintiffs, but contended, merely, that the Plaintiffs did not sustain any damage from the acts complained of. In January 1851, the Plaintiffs entered up judgment in the

1851:
1st, 3rd, and
4th Dec.

Injunction.
Water-right.
Acquiescence.

What conditions are required in order to induce a Court of Equity to grant an injunction to restrain the infringement of a right, acquired by long user, to use the water of a stream for certain purposes.

1851.
WOOD
v.
SUTCLIFFE.

action; and, in the next month, they filed a bill for an injunction to restrain the Defendants from discharging or pouring into the stream, either directly or by means of the drain, any filthy, noxious, or offensive substances or materials, or foul or impure waters, so as to render the water of the stream, above or at the Plaintiffs' mills, foul or unfit for the working of the said mills.

Mr. *Bethell* and Mr. *Daniel* moved for the injunction.

Mr. *Rolt*, Mr. *Malins*, and Mr. *Elderton* opposed the motion.

Mr. *Daniel* replied.

The Rochdale Canal Company v. King (a), and the cases there cited, were referred to in the course of the argument.

The *Vice-Chancellor*, after stating the facts of the case and observing that the Plaintiffs had established, at law, their right to use the water of the stream for the above-mentioned purposes, indeed, that the Defendants did not dispute that right, and that the Plaintiffs had also established that the Defendants had infringed it, proceeded in these words:

Such being the case, the question which I have to decide, is whether the Plaintiffs are entitled to apply to a Court of Equity for an injunction? It is not my intention to enter into a general disquisition as to the grounds on which Courts of Equity will interfere in all the differ-

(a) *Ante*, p. 78.

ent sorts of cases in which applications may be made for injunctions ; but I shall confine my observations to the precise sort of case that this is.

1851.
 {
 WOOD
 v.
 SUTCLIFFE.

Now, I conceive that if parties have established such a legal right as the Plaintiffs in this case have established, and another person comes and erects works on the same stream, above their works, and, by his manufacturing process, so fouls the water of the stream as seriously and continuously to obstruct the effective carrying on of their manufacture ; and, if the granting of an injunction will restore or tend to restore those parties to the position in which they previously stood, and in which they have a right to stand ; and if the injury complained of is of such a nature that damages will not be an adequate compensation, that is, such a compensation as will in effect, though not *in specie*, place them in the position in which they previously stood ; and if, moreover (for there are several conditions), they use due diligence in vindicating their rights, they have, in general, a right to come to a Court of Equity and say : “ Do not leave us to bring action after action for the purpose of recovering damages ; but interfere, with a strong hand, and prevent the continuance of the acts we complain of, in order that our legal right may be protected and preserved to us.” I say, in general ; because, whenever a Court of Equity is asked for an injunction in cases of such a nature as this, it must have regard not only to the dry strict rights of the Plaintiff and Defendant, but also to the surrounding circumstances ; to the rights or interests of other persons which may be more or less involved : it must, I say, have regard to those circumstances before it exercises its jurisdiction (which is unquestionably a strong one), of granting an

1851.

WOOD

v.

SUTCLIFFE.

injunction. I have used the terms, "seriously obstruct," because I cannot assent to the proposition that, on the mere dry fact of the Plaintiffs having the abstract right, a Court of Equity will, as a matter of course, on that right being established at law, grant an injunction if the right be infringed ever so minutely. On the other hand, I am far from saying that because, in the action at law, the jury has given only a shilling or a farthing damages, *that* is a ground for concluding that the injury is not serious, and that the case is one in which an injunction ought not to be granted. I have used, also, the terms, "continuously obstruct," by which I mean to indicate, "obstruction frequently recurring," not "never ceasing."

Having stated the conditions which are requisite to induce the Court to grant an injunction in such a case, I proceed to consider how far those conditions are satisfied in the present case. One of those conditions is that the injunction, by stopping the acts complained of, will restore or tend to restore the party complaining, to the enjoyment of that right which he has established against the Defendant. I say: "restore or tend to restore," because I conceive it is no answer to an application of this sort, for the Defendant to say that other persons as well as he are polluting the stream, and that therefore the injunction will not restore the Plaintiff to the enjoyment of his legal right, inasmuch as it will not prevent those other persons from continuing to pollute the water; for the Plaintiff must sue each of the wrong-doers separately; unless, indeed, they are acting in partnership or in concert together; and the obtaining of an injunction against any one of the wrong-doers, though it may not actually restore, does tend to restore the Plaintiff to

the enjoyment of his right, as it is a step towards obtaining an injunction against each of them.

1851.

Wood

v.

SUTCLIFFE.

Now, the Plaintiffs require water for three purposes ; namely, washing wool, generating steam, and condensing steam ; for the first two of which, purity is an essential quality. Not only the Defendants, but the Messrs. *Ripley* and other persons, have manufactories on the banks of the stream, above the Plaintiffs' mills. The works of Messrs. *Ripley*, who are dyers, were established long before the Plaintiffs' mills were ; but the works of the other persons were established at a comparatively recent period. Besides those various works, a very large and dense population has gradually grown up on or near to the banks of the stream. No doubt, however, there was a time, and probably not a very remote one, when the stream, or that portion of it which lies between Messrs. *Ripley's* works and the Plaintiffs' mills, flowed through open fields, pure and unpolluted, to the Plaintiffs' mills. But whenever human beings congregate, in large numbers, on the banks of a stream, the inevitable consequence is that a great quantity of sewerage is discharged into the stream, which necessarily has the effect of polluting it. Therefore, to some considerable extent, the pollution of this stream is inevitable. Not all the Courts of Law and Equity in the kingdom can prevent it ; for they cannot remove the mass of human beings who are congregated on the banks of the stream. The Plaintiffs, themselves, have been obliged to submit to the inevitable consequence of this increase of population, and have been compelled to procure pure water from another source, by sinking a well on their own premises for that purpose ; and, for many years before the Defendants commenced their works, the Plaintiffs ceased

1851.

WOOD

v.

SUTCLIFFE.

to use the water of the stream for washing wool, and used it only occasionally, that is to say, when the machinery of the well was out of order, even for the purpose of generating steam. Therefore, if this injunction were granted, it would not have the effect of restoring or tending to restore the Plaintiffs to the position in which they originally stood; for the water would still flow to their mills in so polluted a state that they could not use it, as they originally did, for either washing wool or generating steam.

On the other hand, to grant the injunction would have the effect of seriously injuring, if not ruining the Defendants. Weighing, then, the injury that may accrue, to the one party or the other, by granting or refusing the injunction, I think that, if my decision were to turn upon this point alone, I should be bound to refuse it.

Another condition which, as I have said, is necessary in order to induce a Court of Equity to interfere, by injunction, in a case similar to that now before me, is that the mischief complained of is such that it cannot be properly and adequately compensated by pecuniary damages. Now, let us see how the matter stands in this respect. Many years before the Defendants' works were commenced, Mr. *Dixon*, Messrs. *Greenwood*, and other individuals, had works in what is, aptly enough, called the nest of factories immediately above the Plaintiffs' mills; and they, also, having polluted the stream, the Plaintiffs threatened to bring actions against them: whereupon they entered into deeds of arrangement with the Plaintiffs, by which, in order to avoid litigation, they agreed to pay the Plaintiffs at the rate of 2*l. per annum*, per horse power, for the right of polluting the water.

Now, if such an arrangement as that can be made, ought I to grant an injunction in order to compel the Defendants to enter into it, when the bringing of an action would be almost (I will not say quite) as efficacious? If the Plaintiffs desire to apply to the Defendants a certain pressure in order to bring them to terms, I think that I ought to leave Plaintiffs to that pressure which may be applied by means of an action or actions at law. If the Plaintiffs brought an action, and, the matter being represented to the jury, the jury were satisfied that the Defendants ought to come to terms, they might give the Plaintiffs 50*l.* or 100*l.* damages, instead of a farthing, a shilling, or forty shillings. On the ground, therefore, that the Plaintiffs themselves have shown that the injury they complain of is one which, in some way, may be compensated by money, I think that I ought not to grant the injunction.

But I do not rest my decision upon either of the grounds which I have mentioned. The principal ground upon which I conceive that I must refuse this injunction, is that the Plaintiffs have not used due diligence in vindicating their rights. They stood by whilst the Defendants were constructing their works, and they suffered the Defendants to use their works after they were constructed, from the beginning of 1845 until the beginning of 1850, a period of very nearly five years, without giving them any hint that they were doing anything that they had not a lawful right to do; and, if there had been nothing else in this case, I should have been of opinion, on this ground alone, that the Plaintiffs were not entitled to the injunction.

I incline to think also that the injunction ought to be

1851.
Wood
v.
SUTCLIFFE.

1851.

WOOD

v.

SUTCLIFFE.

refused on the ground that the injury complained of is capable of being compensated by money; and, in my opinion, it ought also to be refused on the ground that the granting of it would inflict serious damage upon the Defendants, without doing any real practical good to the Plaintiffs.

Injunction refused. Costs of the motion reserved until the hearing of the Cause.

overruled 2 Lj. An & 604

PLOWDEN v. HYDE.

A PETITION in this Cause, presented by the Plaintiff, *Charles Hood Chicheley Plowden*, prayed (amongst other things), that a deed of re-conveyance of the 7th of December 1813, therein stated, did not, as to the hereditaments comprised in that deed, operate as a revocation of the will of *Henry Chicheley Plowden*, the testator in the Cause, and that the legal estate in the same hereditaments descended, upon the death of the testator, to his heir-at-law, as a trustee for the devisees, under his will, of the equity of redemption thereof; and that it might be declared that the hereditaments comprised in the deed of conveyance of the 9th of November 1811, also stated in the Petition, were devised by the will of the testator, he having contracted to purchase the same

1851 :
12th and 13th
Dec.
1852 :
10th Feb.

Will.
Revocation.
Election.

In April 1811, *A.* conveyed an estate (which stood limited to him and his trustee to the usual uses to bar dower) to a mortgagee in fee, subject to a proviso for

the reconveyance thereof to him, *his heirs, appointees, or assigns, or to such other person or persons, to such uses and in such manner as he or they should direct.* In May following, he devised all his messuages, lands, &c. and all other his real estate, or which he had contracted to purchase, situate in or near the parishes of *B.* and *S.* or elsewhere in *England*, of or to which he or any person or persons in trust for him, was or were seised or entitled for any estate of freehold and inheritance or of freehold only, in possession, reversion, remainder, or expectancy, or which he had power to dispose of or appoint by his will, to *J. D.*, a stranger to him in blood, and his heirs, to certain uses and upon certain trusts. In 1813, he paid off the mortgage, and took a reconveyance, by which, after reciting the mortgage, the premises were limited to him and his trustee, to the usual uses to bar dower.

In 1809 he purchased an estate in one of the parishes mentioned in his will, at an auction, and, in Nov. 1811, that estate was conveyed to him and his trustee, to the usual uses to bar dower.

Held, that the reconveyance of 1813, and the conveyance of 1811, revoked the will as to the mortgaged premises and purchased estate, respectively, and that the testator's heir, (who was entitled to benefits under the will,) was not bound to elect.

1851.

PLOWDEN

v.

HYDE.

prior to the date thereof; and that, if the Court should be of opinion that the devise of the last-mentioned hereditaments was revoked by the said conveyance, then that it might be declared that the Defendant, *James Chicheley Plowden* (who was the son and heir of *James Chicheley Plowden*, the testator's original heir) was bound to elect between the last-mentioned hereditaments, and the monies to which he would become entitled under the same will, by virtue of the bequest, mentioned in the petition, to his late father; and that, if he should elect to confirm the will, then that he might be declared a trustee of the same hereditaments for the devisees under the testator's will.

The facts of the case are stated shortly in the marginal note, and more fully in the judgment; where, also, the arguments and cases cited are noticed.

Mr. *Willcock* and Mr. *Jessel* appeared for the Petitioner.

Mr. *Malins*, Mr. *Hetherington*, Mr. *H. Stevens*, Mr. *Wood*, and Mr. *Erschine* supported the petition for other parties.

Mr. *James Russell* and Mr. *Lewin* appeared for the Respondent, *James Chicheley Plowden*, the son.

1852.
Feb. 10.

The *Vice-Chancellor* delivered judgment in the following words:—

Two questions are raised in this case: first, whether certain acts done by the testator in the Cause, after making his will, with respect to certain real estates of

which he was the owner in Equity at the date of his will, and which, but for those acts, would have passed by his will, have had the effect of revoking the devise of those estates; and, second, if such revocation has resulted from those acts, whether the testator's heir, claiming those estates by descent, ought to be put to his election?

These questions arise with respect to two different portions of the real estates of the testator, under somewhat different circumstances.

With respect to the first portion, which, for convenience, I will call the mortgaged property, the following are the facts: The testator, *Henry Chicheley Plowden*, having, in 1809, mortgaged this estate in fee, afterwards paid off the mortgage, and, by indentures of lease and release, dated respectively the 22nd and 23rd of April 1811, the estate was reconveyed to him to the common uses to bar dower, that is to say, to the use of such persons and for such estates as he should, by deed or will, appoint, and, in default of appointment, to the use of the testator and his assigns for his life, and, after the determination of that estate by any means in his lifetime, to the use of *John Dyneley*, his executors, administrators and assigns, during the testator's life, upon trust for the only benefit of the testator, to the intent that any wife of the testator might be excluded from dower; and, after the determination of the estate so limited to *Dyneley*, to the use of the testator, his heirs and assigns.

Very shortly afterwards the testator borrowed 3000*l.* of *William Newton* on mortgage of this estate, and, by indentures of lease and release, dated respectively the 30th of April and 1st May 1811, after reciting the in-

1851.
—
FLOWDEN
v.
HYDE.

1851.

FLOWDEN

v.

HYDE.

indentures of lease and release of the 22nd and 23rd April 1811, the testator, in consideration of the 3000*l.* advanced by *Newton*, appointed and conveyed the estate to *Newton* in fee, subject to a proviso for redemption, by which it was declared and agreed that, if the said *H. C. Plowden*, his heirs, appointees, executors, administrators or assigns, should pay, or cause to be paid, to the said *William Newton*, his executors, administrators or assigns, the sum of 3000*l.*, with interest at the rate of *five per cent. per annum*, on the 1st of November then next ensuing, then the said *William Newton*, his heirs and assigns and all persons claiming under him or them, should and would, upon the request and at the costs and charges of the said *H. C. Plowden*, his heirs, appointees, or assigns, reconvey and re-assure the premises unto the said *H. C. Plowden*, his heirs, appointees, or assigns, or to such other person or persons, to such uses and in such manner as he or they should direct, free from incumbrances.

On the 15th May 1811, the testator made his will of that date, whereby he devised, to *John Dyneley*, his heirs and assigns : “all and every my messuages, lands, tenements, and hereditaments, and all other my real estate whatsoever, or which I have contracted to purchase, situate in or near the parishes of *Boldre* and *South Baddesley*, in the county of *Southampton* or elsewhere in *England*, of or to which I or any person or persons in trust for me, am, is, or are seised or entitled for any estate of freehold and inheritance or of freehold only, in possession, reversion, remainder, or expectancy, or which I have power to dispose of or appoint by this my will, with their rights, members, and appurtenances,” to hold to *Dyneley* and his heirs, to certain uses and upon certain trusts therein mentioned.

In December 1813, the testator paid off the mortgage, and took a reconveyance of the estate by indentures of lease and release, dated respectively the 6th and 7th December 1813, whereby, after reciting the mortgage to *Newton*, with the proviso for redemption, *Newton*, in consideration of the 3000*l.* then repaid to him by the testator, conveyed the estate to the testator, his heirs and assigns, to the use of such persons and for such estates as the testator should, by deed or will, appoint; and, in default of appointment, to the use of the testator and his assigns for his life, and, after the determination of that estate by any means in his lifetime, to the use of *Dyneley*, his executors, administrators and assigns, during the testator's life, upon trust for the benefit of the testator, to the intent that any wife of the testator might be excluded from dower; and, after the determination of the estate so limited to *Dyneley*, to the use of the testator, his heirs and assigns.

1851.
PLOWDEN
v.
HYDE.

The testator died on the 12th January 1821, without republishing his will. The question as to this mortgaged property, is whether, by reason of the conveyance of December 1813, the will was revoked so far as it operated to devise that property?

With respect to the second portion of the testator's real estates now in question, which, for convenience, I will call the purchased property, the following are the facts:—

In 1809 certain lands at *South Baddesley* having been put up for sale by auction by the then owners, the testator bid for and became the purchaser of lot 1, at the price of 1800*l.* This lot 1 comprised the freehold land

1851.
—
PLOWDEN
v.
HYDE.

now under consideration, and also certain leaseholds. No written contract for the purchase is forthcoming, nor is there any evidence of the terms of the contract, except so far as anything can be collected from the language of the conveyance, which I shall presently mention.

Before any conveyance was executed to the testator, he made his will, dated 15th May 1811, to the effect I have before stated. After the date of the will, the freehold part of the lands comprised in lot 1, was conveyed to the testator by indentures of lease and release, dated respectively the 8th and 9th November 1811, whereby, after reciting the sale by auction in 1809, and that the testator had bid 1800*l.* for lot 1, comprising those freehold lands and certain leaseholds, and that he was allowed and declared to be the highest bidder for and purchaser of all the lands comprised in that lot, at the said price of 1800*l.*; and reciting that it had been agreed that 400*l.* should be the apportioned part of the 1800*l.* to be paid as the purchase and consideration money for the lands thereafter expressed to be thereby conveyed* (being the freehold part of the lands); it was witnessed that, in pursuance of the said agreement and in consideration of 400*l.* paid to the vendors by the testator, the lands in question were conveyed to the testator, *to the common uses to bar dower, Dyneley* being the trustee, as he was in the conveyance of the mortgaged property before mentioned.

The question as to this purchased property, is whether, by reason of the conveyance of November 1811,

* In the brief, the words : " and the fee simple and inheritance thereof," followed the word, " conveyed."

the will was revoked so far as it operated to devise that property.

1851.
—
FLOWDEN
v.
HYDE.

With respect to this question of revocation, as applicable both to the mortgaged and the purchased property, several cases have been cited in the argument, and many others are to be found in the books. In some of those cases the testator, at the date of his will, had the legal estate in the lands, and, in others, he had only an equitable estate or interest. In the case now before me, the estate or interest which the testator, at the date of his will, had in each of the two portions of property in question, was an equitable estate or interest; and, therefore, it is to the cases comprised in the latter class that more especial reference must be had, in order to deduce the established doctrine on the subject, as applicable to the case now under consideration.

The general rule of law to be deduced from this latter class of cases, may be thus stated: that if, after the date of the will, the land is so conveyed to the testator that the legal estate therein, which becomes vested in him by the conveyance, is the same, in quality, as the equitable estate which he had at the date of the will, the conveyance does not revoke the devise. And so, in the case where the testator's interest in the land at the date of the will consists in a contract which he had entered into for the purchase of the land, if the land is afterwards conveyed to him by the vendor, in accordance with the terms of the contract between them, the conveyance does not revoke the devise. But, on the other hand, if the legal estate which the testator acquires by the conveyance, differs, in quality, from the equitable estate which he had at the date of the will, the conveyance revokes the devise. And so, in the case of the contract for pur-

1851.
PLOWDEN
v.
HYDE.

chase, if the legal estate which the testator acquires by the conveyance, differs from that which, by the terms of the contract, the vendor agreed to convey to him, the conveyance revokes the devise. And this revocation equally takes place, even though the testator, after the conveyance, has as absolute a power of disposing of the property as he had before. And the revocation takes place without regard to the testator's intention, and even in direct contravention of his intention. Eminent judges have heretofore expressed, in strong terms, their disapprobation of the principle of this rule of revocation, and their regret that it should have been established, or, at least, that it should have been carried so far as it has been carried; but they have felt themselves constrained to follow it. While I fully participate in that disapprobation and that regret, I am equally obliged to recognise it as the long-established rule of the Courts, and, if the occasion requires, to act upon it.

Now, with respect to the mortgaged property, if we are to inquire what estate the testator had in the equity of redemption at the date of his will, I think it would be very difficult to say that he had any other than an estate in fee simple. And, if I were compelled to confine myself to this view of the matter, it would follow that a subsequent conveyance of the legal estate, to the testator, in any other form than in fee, would be a revocation of the devise. But the devisee has a right to refer to the particular terms of the proviso for redemption in the mortgage deed, as showing an agreement between the mortgagor and mortgagee that, upon repayment of the mortgage money, the premises should be reconveyed, not simply to the mortgagor in fee, but in some other special form; and, if the legal estate was, in fact, reconveyed in the form in which, by the terms of the proviso,

it was agreed to be reconveyed, the reconveyance does not operate as a revocation of the devise. What, then, are the terms of the proviso for redemption as to the reconveyance of the premises, on payment of the mortgage money? They are to be reconveyed "unto the said *H. C. Plowden*, his heirs, appointees, or assigns, or to such other person or persons, to such uses and in such manner as he or they shall direct." A question here arises whether the words "unto the said *H. C. Plowden*, his heirs, appointees, or assigns," are to be construed as designating the person or persons to whom the premises were to be reconveyed, or the form in which the reconveyance was to be made to *Plowden*. The language of the proviso, throughout, seems to favour the former construction, for it imports that the appointees of *Plowden*, as well as *Plowden* himself, or his heirs, or his assigns, may pay off the mortgage debt; that the reconveyance is to be made upon the request and at the costs and charges of *Plowden*, or of his heirs, or of his appointees or assigns, and that not only *Plowden* himself or his heirs or assigns, but his appointees also should have the right to direct to what persons, and to what uses, and in what manner the estate should be reconveyed; the word "appointees," which is used several times in the proviso, seeming, in every instance, to be used to designate some person or persons to whom *Plowden* might appoint the estate previously to its being reconveyed. If this is the construction which ought to be put upon the words, "unto the said *H. C. Plowden*, his heirs, appointees or assigns," that is, if the parties agreed, by this proviso, that the premises were to be reconveyed to *Plowden*, or to his heirs, or to his assigns, or to his appointees, in the alternative, *that* could only mean to one or other of those persons in fee; and then it is clear, upon the authorities, that the reconveyance which was

1851.
 PLOWDEN
 v.
 HYDE.

1851.
 PLOWDEN
 v.
 HYDE.

made to *Plowden*, not in fee but to the common uses to bar dower, would be a revocation of the devise, and the addition of the words "or to such person or persons, &c., as he or they may direct," would not have any effect to prevent the revocation.

But let us now take the other supposition, and assume that the words "unto the said *H. C. Plowden*, his heirs, appointees, or assigns," are to be construed as designating the form in which the premises were to be reconveyed to *Plowden*; which is the view most favourable to the devisee. Upon that assumption, I think that the word "appointees," would be sufficient to justify the introduction, into the reconveyance, of a power of appointment; and that if the reconveyance had been made to the use of such persons and for such estates as *Plowden* should, by deed or will, appoint, and in default of appointment, to the use of *Plowden*, his heirs and assigns, such reconveyance would have been in conformity to the proviso, and would not have worked a revocation. If so, the question is reduced to this: Do the other words, "unto the said *H. C. Plowden*, his heirs or assigns," justify the reconveyance to the use of *Plowden* for life, and after the determination of that estate, by any means, in his lifetime, to the use of a trustee during his life, with remainder to the use of *Plowden* in fee? Or, to put the same question in another form, if, by the proviso for redemption, it had merely been agreed that, on repayment of the money, the estate should be reconveyed to *Plowden*, his heirs or assigns, and the reconveyance had been made to the use of *Plowden* for his life, and then to the use of a trustee during his life, and then to *Plowden*, his heirs and assigns, would this have been a reconveyance in conformity to the terms of the proviso, so that the devise would have remained unrevoked? It appears

to me that, if I were so to decide, I should be acting in direct opposition to the principle of all the decided cases. An estate to a man for his life, with an estate in fee simple by way of remainder (the union of the two estates being prevented by an intermediate limitation to a trustee during his life), is a very different estate from an estate in fee simple in possession. If the testator's estate, previously to the conveyance, had been an equitable estate in fee, his taking a conveyance of the legal estate in such a form as to vest in him, not a legal estate in fee, but only a legal estate for his life, with a legal fee by way of remainder, the two estates being kept from uniting by the interposition of a limitation to a trustee, is not, in the language used in some of the cases, simply taking the estate home; but it is creating a new and different limitation of it. And, according to all the authorities, if the effect of the reconveyance is to create a new limitation of the estate, different from the equitable estate which the testator had at the date of his will, or different from that which would be created by pursuing strictly the terms of the contract for the reconveyance, the effect is a revocation of the devise.

It has, indeed, been argued before me that the words: "unto *A. B.*, his heirs, appointees or assigns," constitute an apt and appropriate formula for expressing, briefly, all the limitations ordinarily contained in a conveyance to the common uses to bar dower, including not only the general power of appointment, but also the limitation for life to the party in whose favour the conveyance is made, and the remainder to him in fee, with the intermediate limitation to the trustee, to prevent the union of the life estate, and the remainder in fee. And it was contended, that the formula in question is often used for that purpose; and that there is the more reason for con-

1851.
 PLOWDEN
 v
 HYDE.

1851.
PLOWDEN
v.
HYDE.

sidering it to have been used for that purpose in the present case, because the indenture of mortgage to *Newton* recites the indenture of April 1811, by which the estate had been conveyed to the testator to the common uses to bar dower, and that, therefore, in effect, the proviso for redemption ought to be read as if it had stipulated that on repayment of the mortgage money, the premises should be reconveyed to the same uses to which they had been limited by the indenture of April 1811.

I should have been well pleased if I could have acceded to this argument, but I look, in vain, to the language of the proviso for redemption, to find any reference to the indenture of April 1811; in fact, it does not contain the slightest trace of any such reference. If it had been intended that, upon the repayment of the mortgage money, the premises should be reconveyed to the same uses to which they had stood limited by the indenture of April 1811, it would have been easy to have so worded the proviso for redemption as to have expressed that intention. The recital of that indenture in the mortgage deed cannot, in my opinion, be considered as introduced for the purpose of showing that the parties intended the reconveyance to be made to the same uses as were expressed in that indenture; in fact, such recital was introduced for another purpose, namely, that, as the assurance to the mortgagee must be by an exercise of the power of appointment as well as by lease and release, it was necessary to recite the indenture creating the power, and that recital would have been equally introduced whatever might have been the intention of the parties as to the form of the reconveyance by the mortgagee, when the mortgage debt should be paid off. And, with regard to the suggestion that the words, "unto *A. B.*, his heirs, appointees or assigns," are often used as a formula

for expressing all the limitations ordinarily contained in a conveyance to the common uses to bar dower, I answer that they are so used only in loose parlance, and not in the formal and appropriate language of a deed ; and that such use of them is inapt and inaccurate ; for, granting that those words sufficiently indicate a power of appointment, and that they would constitute an apt and appropriate formula for expressing a limitation to the use of such persons and for such estates as *A.* shall appoint, and, in default of appointment, to the use of *A.* in fee, how do they indicate the dividing and parcelling out the fee into a life estate, and a remainder in fee, with an intermediate limitation to the use of a trustee during the life of the tenant for life ? I cannot decide that a contract to convey to *A.*, his heirs, appointees, or assigns, does, *ex vi terminorum*, import that the conveyance is to be made in the special form of limitations, to the use of such persons and for such estates as *A.* shall appoint, and, in default of appointment, to the use of *A.* for life, and after the determination of that estate in his lifetime, to the use of a trustee during his life, and, after the determination of the estate so limited to the trustee, to the use of *A.*, his heirs and assigns.

I may refer to the judgment of Lord *Langdale*, in *Bullin v. Fletcher* (a), as a clear and, as I think, unimpeachable authority on this part of the case.

I am, therefore, constrained to conclude, with respect to the mortgaged property, that, by the reconveyance from *Newton* to the testator, of the 6th and 7th December 1813, the devise of that property was revoked.

With respect to the purchased property the case is

(a) 1 Keen, 369.

1851.
 PLOWDEN
 v.
 HYDE.

1851.
PLOWDEN
v.
HYDE.

even still more clear. Indeed, the only argument that could be offered as a ground for holding that the conveyance from the vendors by the indenture of the 9th November 1811, did not revoke the devise, was this: that, as that indenture expressed that the conveyance was made in pursuance of the agreement for the purchase, it is to be inferred that there was a special contract, between the testator and the vendors, that the purchased lands should be conveyed to the testator, not in fee, but to the common uses to bar dower. Even, if the fact were as assumed by this argument, that the conveyance was expressed to be made in pursuance of the agreement for the purchase, I could not have concurred in the conclusion. The purchaser of a fee simple estate, has a right to have the estate conveyed to any uses or in any manner he may please to direct; and, to whatever uses or in whatever manner the estate may be conveyed by the purchaser's direction, the conveyance might, with equal propriety, be expressed to be made in pursuance of the agreement for the purchase, although there was no special provision, in the contract, as to the particular uses to which the estate was to be conveyed by the vendors. But, further, the very foundation of this argument fails; for, upon examining the language of the indenture of the 9th November 1811, it will be found that the conveyance is not expressed to be made in pursuance of the agreement for the purchase. It will be remembered that Lot 1, for which the testator had bid 1,800*l.* at the sale, comprised the freeholds in question, and certain leaseholds. The indenture of the 9th November 1811, which only conveys the freeholds, recites that *Plowden* was allowed and declared to be the highest bidder for and purchaser of the premises comprised in Lot 1, at the price of 1,800*l.*; and that it had been ascertained that the hereditaments intended to be thereby conveyed,

which formed the freehold part of the said Lot 1, were of the value of 400*l.*; and that it had been agreed that the said 400*l.* should be the apportioned part of the said sum of 1,800*l.* to be paid in respect of and as the purchase and consideration money for the hereditaments thereafter expressed to be thereby conveyed;* and the indenture witnesses that, in pursuance of the said agreement, and in consideration of 400*l.* paid to the vendors by *Plowden*, the vendors convey the freehold hereditaments in question to *Plowden*, to uses to bar dower. So that the words, "in pursuance of the said agreement," refer, not to an agreement for the purchase of the land, for no such agreement is specified, but to the agreement, which is specially mentioned, as to the 400*l.* being the apportioned part of the whole purchase money, which was to be paid in respect of the freeholds.

1851.
 PLOWDEN
 v.
 HYDE.

With respect then to the purchased property, I am of opinion that, by the conveyance of the 9th November 1811, the devise of that property was revoked.

The only question which remains for consideration is this: whether the testator's heir claiming these lands by descent, and claiming also certain benefits under the will, ought to be put to his election as regards either the mortgaged or the purchased property?

It is to be observed that the mortgaged property is not specially mentioned in the will, but the will does specially mention, among the real estates devised, the lands which the testator had contracted to purchase, situate in or near the parishes of *Boldre* and *South Baddesley*, in the county of *Southampton*. I will assume,

* In the brief, the words: "and the fee simple and inheritance thereof," followed the word, "conveyed."

1851.

PLOWDEN

v.

HYDE.

in favour of the devisee (although the fact is not clearly ascertained), that the purchased property now in-controversy, is part of the hereditaments thus specially mentioned and devised by the will. And in considering the proposition that the heir ought to be put to his election, I will have regard, more particularly, to the lands thus specially mentioned and devised ; because, if the proposition cannot be maintained as to those lands (as in my opinion it cannot), *à fortiori*, it cannot be maintained as to those lands which are not specially mentioned and devised.

The argument on behalf of the devisee, is this : That the effect of the testator acquiring, by the subsequent conveyance, a different estate from that which he had at the date of his will, is not, properly speaking, revocation, but ademption ; that the estate or interest which he had when he made his will, is, indeed, gone from him ; and, therefore, the devise cannot operate upon it ; but the words of the devise are not expunged from the will ; that they are still capable of expressing and do express the testator's intention to devise the lands there specially mentioned ; so that, at the testator's death, when the will comes into operation, the devise of the particular lands still stands part of the will, and the testator died seised of those very lands ; and, although by the rule of law, the devise cannot actually pass the estate which the testator acquired by the subsequent conveyance, yet, as the heir, by asserting his right to take the estate by descent, would defeat or disturb the express disposition of that estate by the will, he ought, according to the plain principle of election, to give up his right to take the estate by descent, or abandon the benefits intended for him by the will. Now, it may be admitted that, if the heir, by asserting his right to take the estate by descent, would defeat or disturb an express disposition made by the will

of that estate which he thus claims by descent, he ought to be put to his election according to the decisions in *Thellusson v. Woodford* (b), and *Churchman v. Ireland* (c): and, therefore, the only question is, whether the testator has, by his will, made an express disposition of that estate which the heir claims by descent? What is the estate which the heir claims by descent? It is that estate in fee simple in remainder expectant on the determination of the estate limited to the trustee during the testator's life, which became vested, in the testator, by the conveyance made to him after the date of his will. Has then the testator, by his will, made an express disposition of the estate which became vested in him by that subsequent conveyance? The devise in the will, is of "all and every my messuages, lands, tenements, and hereditaments, and all other my real estate whatsoever, or which I have contracted to purchase, situate in or near the parishes of *Boldre* and *South Baddesley* in the said county of *Southampton* or elsewhere in *England*, of or to which I, or any person or persons in trust for me, am, is or are seised or entitled for any estate of freehold, and inheritance, or of freehold only, in possession, reversion, remainder or expectancy, or which I have power to dispose of or appoint by this my will." In this language, there is nothing which points to any estate or interest which the testator might have at a future time; on the contrary, the terms of the devise refer, exclusively, to such estate and interest as he then had. At the time when he penned that devise, he had an estate or interest to which the language was properly applicable, and which, but for the subsequent conveyance, would have passed by the devise. What is there which indicates the slightest intention to devise another estate and interest

(b) 13 Ves. 209.

(c) 1 Russ. & Myl. 250.

1851.
 PLOWDEN
 v.
 HYDE.

1851.

PLOWDEN

v.

HYDE.

which was not then vested in him, but which he might thereafter acquire? It is a rule which ought to be strictly adhered to, that, to put the heir to his election, the testator's intention to devise or dispose of such estate or interest as he might thereafter acquire, must be expressly and unequivocally manifested by the will, and in this will there is not the slightest trace of any such intention. To show that the language, here used by the testator, must be held to refer, exclusively, to the estate or interest which he had at the date of his will, I may refer to the cases of *Rudstone v. Anderson* (d), and *Hone v. Medcraft* (e), and the judgment of Lord Eldon, in *James v. Dean* (f). It is true that these were cases of leaseholds, but that is immaterial with respect to the question whether the words of the devise are to be construed as pointing only to the testator's present estate or interest, or to such estate or interest as he might thereafter acquire.

Being then of opinion, that the testator has expressed his intention to devise only the estate or interest which he had in the lands at the date of his will, and not such other estate or interest as he might thereafter acquire, I am brought to the conclusion that the heir does not, by claiming these lands by descent, defeat or disturb any disposition made or intended to be made by the will, of that estate which has descended upon him, and that, therefore, he ought not to be put to his election. In truth, the disposition which the testator had made, by his will, with regard to these lands, has been defeated, in his lifetime, by his own act in taking such a conveyance as put an end to the estate or interest which he

(d) 2 Ves. sen. 418.

(e) 1 Bro. C. C. 261.

(f) 11 Ves. 388.

then had, and which alone was intended to be disposed of by his will, and vested in him a new and different estate, which the will does not manifest any intention to dispose of.

1851.
 PLOWDEN
 v.
 HYDE.

Upon the whole of the case, I am of opinion that the devise in the testator's will, so far as relates to the lands comprised in the indentures of the 7th December 1813, and the 9th November 1811, respectively, was revoked by those respective conveyances, and that those lands did not pass by the will, but descended on the testator's heir-at-law, and that the heir ought not to be put to his election. I must therefore dismiss the Petition.

SEWELL v. MOXSY.

IN February 1851, *N. Stallwood* died indebted to *T. Sanders*. *Sanders* died in the next month. In the following November, his widow, who was his executrix and the sole legatee of his personal estate, executed a deed-poll, containing a power of attorney, by which, in consideration of five shillings, she assigned the debt to the Plaintiff, *Sarah Sewell*, for the Plaintiff's own use and benefit. The Plaintiff alleged the debt to be due to her from *Stallwood's* estate, and claimed to be paid it: and, in default thereof, to have *Stallwood's* real and personal estate administered on behalf of herself and all his other unsatisfied creditors. *Sanders's* widow was made a Co-defendant with *Stallwood's* executor and the persons interested in his real estates under his will: and her execution of the deed-poll was proved, and evidence was given that the debt was still unpaid. The question was whether the voluntary assignee of a debt, could sue for the administration of the debtor's estate?

1852:
 19th January.
 Creditor's
 Suit.
 Voluntary
 Deed.
 Plaintiff.

A voluntary assignee of a debt due from a person deceased, cannot maintain a suit for the administration of the deceased's estate.

1852.

SEWELL
v.
MOXSY.

Mr. *Pole* appeared for the Plaintiff.

Mr. *Buxton*, for Mrs. *Sanders*, said that she did not dispute the assignment, and submitted the question to the decision of the Court.

Mr. *Steere* appeared for *Stallwood's* executor.

Mr. *Stuart* and Mr. *Giffard*, for the parties beneficially interested in *Stallwood's* real estate, said that an assignment of a *chose in action*, was a mere agreement; and, if it was voluntary, a Court of Equity would not enforce it; and, therefore, the Court would not make any order in this case; though it might, perhaps, have made an order if the Plaintiff had sued in Mrs. *Sanders's* name.

The *Vice-Chancellor*.]—Might not the Plaintiff and Mrs. *Sanders* have joined as Co-plaintiffs?

Argument resumed.—They could not have joined as Co-plaintiffs; because Mrs. *Sewell* has no interest, or which is the same thing, no enforceable interest: *Cholmondeley v. Clinton* (a).

Mr. *Stuart* and Mr. *Giffard* cited the following cases upon the principal question in the case: *Squib v. Wyn* (b), *Edwards v. Jones* (c), by which, it was said that *Fortescue v. Barnett* (d) was, in effect, overruled; *Ward v. Audland* (e), *Mac Fadden v. Jenkyns* (f), *Meek v. Kettlewell* (g), and *Fulham v. Mac Carthy* (h).

- | | |
|---|------------------------------------|
| (a) 2 Jac. & W. 1, and 4 Bli. see p 81. | (f) 1 Hare, 458, and 1 Phill. 153. |
| (b) 1 P. W. 378. | (g) 1 Hare, 464, and 1 Phill. 342. |
| (c) 1 Myl. & Cr. 226; see 237, <i>et seq.</i> | (h) 1 Ho. Lds. Ca. 703; see 718. |
| (d) 3 Myl. & K. 36. | |
| (e) 8 Beav. 201. | |

Mr. *Pole* replied.

1852.

SEWELL

v.

MOXSY.

The VICE-CHANCELLOR, after stating the facts of the case, and observing that it was not disputed that the debt was due from *Stallwood's* estate; and that Mrs. *Sanders*, the assignor of the debt, was made a Defendant and appeared by her Counsel, who, no doubt very discreetly, took no part in the argument, but submitted the question to the decision of the Court, proceeded thus :

The question is whether the debt is due to the Plaintiff; for, to entitle her to sue, she must be a creditor of *Stallwood*? She says that she is a creditor by virtue of the assignment made to her by Mrs. *Sanders*. But an assignment of a *chose in action*, does not convey any legal right. In the view of a Court of Equity, it operates only as an agreement : and, if it is voluntary, the Court will not enforce it, at the suit of the assignee, against the assignor. Now, the assignment under which the Plaintiff claims to be a creditor of *Stallwood* was voluntary ; and, consequently, the Plaintiff could not enforce it against Mrs. *Sanders*, the assignor. And, that being so, I cannot decide that she is a creditor of *Stallwood*, or entitled to sue as such. Therefore, the claim filed by her, must be dismissed with costs.

1852:

March 6.

*Will, vesting
and divesting.
Construction of
"dying without
issue."*

WESTWOOD v. SOUTHEY.

A testator, who had two sons and one daughter, gave the interest, dividends and annual proceeds of 3000*l.* stock, standing in his name, to *W.*, one of his children, for life, and after his decease, he gave the said principal stock or sum of

3000*l.* unto all and every the child and children of *W.* to be equally divided between and amongst them, if more than one, share and share alike; and if but one, the whole to such one, to be paid or transferred to him, her or them, on his, her or their attaining twenty-one, and the interest to be in the mean time applied for maintenance and education; he gave similar legacies to each of his other two children and their children; and upon the death of either of my said sons or daughter without issue, then I direct that the interest, dividends and produce so as aforesaid given and bequeathed to him, her or them so dying, shall be paid and payable to the survivors or survivor of them my said sons and daughter in equal shares and proportions.

The testator's son *W.* survived him, and had one child, who predeceased him.

Held, that the limitation over referred to the death of either of the testator's children without leaving issue living at his death; that the child of *W.* took a vested interest at his birth, but liable to be divested by the death of *W.*, without leaving issue living at his death, and that the gift over therefore took effect. (*Billingsley v. Wills*, 3 Atk. 219, and *Battford v. Kebbell*, 3 Ves. 363, commented upon.)

IN this case there were two petitions praying for payment of a sum of 3,000*l.* stock; one was presented by the two surviving children of *John Westwood*; the other by *S. Westwood*, the widow of *William Westwood*, as administratrix of her deceased child. The question was as to the vesting of a legacy of 3,000*l.* stock under the will of *John Westwood*, in the deceased child of *W. Westwood*, and its subsequent divesting. By his will, *J. Westwood*, who had then two sons and one daughter, gave the interest, dividends and annual produce of 3,000*l.* stock, standing in his name, to *W. Westwood* (one of his children) for life; and from and after his decease, he gave the said principal stock or sum of 3,000*l.* unto all and every the child and children of *W. Westwood*, to be equally divided between and amongst them, if more than one, share and share alike; and if but one, the whole to such one, to

be paid or transferred to him, her or them, on his, her or their attaining twenty-one, and the interest to be in the mean time applied for maintenance and education. He gave similar legacies to each of his other two children and their children. And then there was this gift over: "And upon the death of either of my said sons or daughter *without issue*, then I direct that the *interest, dividends and produce so as aforesaid* given and bequeathed to him, her or them so dying, shall be paid and payable to the survivors or survivor of them, my said sons and daughter, in equal shares and proportions."

1852.
WESTWOOD
v.
SOUTHEY.

W. Westwood had a son, who pre-deceased him.

Mr. *Malins* and Mr. *Welford*, for Mrs. *Westwood*, the representative of the deceased child of *W. Westwood*.

The interest vested in the deceased child of *W. Westwood* immediately on his birth. The postponement of the gift of the principal till after the death of the tenant for life, is only on account of the life interest, and does not prevent the vesting. So far the interest clearly vests. The gift over on the death of *W. Westwood*, without issue, if read generally, would be void for remoteness; but it will not be read generally, but in a limited sense, viz., in case of his dying *without having had issue*: *Yates v. Madden* (a), *Halifax v. Wilson* (b), *Jones v. Jones* (c), *Doe d. Todd v. Duesbury* (d), *Re Bartholomew's Trust* (e). The gift over is only of the interest; there is no gift over at all of the capital. The intention was, that, in the event of the death of any of the children of

(a) 16 Jur. 45.

(b) 16 Ves. 168.

(c) 13 Sim. 561.

(d) 8 Mees. & Wels. 514.

(e) 1 Macn. & Gord. 354.

1852.
 WESTWOOD
 v.
 SOUTHEY.

the testator without issue, only his life interest should go over.

Mr. *Wigram* and Mr. *Faber*, for the surviving children of the testator.

No interest vested till the death of the tenant for life : *Billingsley v. Wills* (f). The gift to *W. Westwood* was of dividends only; there was no gift of the principal at all till his death. It is said that the gift over was only of dividends; but being of dividends generally, it passes the capital: *Page v. Leapingwell* (g). In the cases where the interest has been directed to vest at twenty-one, the Court has struggled to prevent a limitation over from defeating the vesting. But in this case the object of the limitation over on failure of issue was to benefit the survivors of the testator's children: *Hughes v. Sayer* (h), *Ranelagh v. Ranelagh* (i), *Cromek v. Lumb* (k). They cited also *Massey v. Hudson* (l), *Battisford v. Kebbell* (m), *Haigh v. Swiney* (n).

Mr. *Welford*, in reply.

In *Billingsley v. Wills*, the doubt was whether there was any vesting at all. Here the gift is for life to the testator's children, and then a gift to the grandchildren, and a direction for the maintenance and education of the grandchildren, which is of itself an indication of intention to vest the grandchildren's interests on their births. The gift over without issue, means dying

(f) 3 Atk. 219.
 (g) 18 Ves. 463.
 (h) 1 P. Wms. 534.
 (i) 2 Myl. & K. 441.

(k) 3 Y. & Coll. 565.
 (l) 2 Mer. 130.
 (m) 3 Ves. 363.
 (n) 1 Sim. & Stu. 487.

without having *had* issue. If there were no vesting in the grandchildren till their parents' death, and a grandchild were to marry and have children, and die, living his parent, there would be no provision for the children of such grandchild, which could not be the intention.

1852.
WESTWOOD
v.
SOUTHEY.

The VICE-CHANCELLOR:

The questions on these two petitions arise on the construction of the will of *J. Westwood*. At the date of his will, *J. Westwood* had three children, all under age, viz. *Henry F. Westwood*, *Elizabeth Westwood* and *William Westwood*.

The question here is on the gift of a legacy of 3,000*l.* stock for the benefit of *W. Westwood*; but as there are similar legacies for the benefit of the other children, and one of the material clauses in the will applies to the three legacies, they must all be considered.

After certain specific bequests to his eldest son, which are not now in question, the testator proceeds to give in these terms: "I give and bequeath to my son *Henry F. Westwood* the dividends, interest and annual profits to arise from a sum of 3,000*l.*, New 3½ Bank Annuities, now standing in my name in the books of the Governor and Company of the Bank of *England*, for and during the term of his natural life; and from and immediately after his decease, I give and bequeath the said principal sum or stock of 3,000*l.* unto all and every the children of my said son, to be equally divided between and among them, share and share alike if more than one; but if there shall be but one such child, then the whole of the said principal stock or sum of 3,000*l.* to such only child, the same to be paid or transferred to him, her or them on their severally and respectively attaining the age of

1852.
 WESTWOOD
 v.
 SOUTHEY.

twenty-one years, the interest and produce thereof to be in the mean time applied for and towards their maintenance and education."

A similar legacy of 3,000*l.* stock is given in the same terms for *E. Westwood* and her children ; and a third legacy of the same amount of stock is given in the same terms for the benefit of *W. Westwood* and his children.

In each case the legacy is specific. The testator expressly points to the subject of legacy, as being a sum of 3,000*l.*, New 3½ Bank Annuities, "now standing in my name." So far there would not be much ground for doubt ; but after giving the three legacies, the testator proceeds (first directing, which, however, is not material to the present question, the interest and dividends to be applied for the maintenance and education of his children while under twenty-one,) to the clause containing the limitation over, which it is very material to consider : " And also upon the death of either of my said sons or daughter without issue, then I direct that the interest, dividends and produce, so as aforesaid given and bequeathed to him, her or them so dying, shall be paid and payable to the survivors or survivor of them my said sons and daughter in equal shares and proportions."

The testator then gives some small legacies to other persons; and then he gives the residue to his daughter and his younger son *W. Westwood*.

The parts of the will on which the questions in these petitions turn, are those which relate to the legacy to *William Westwood* and his children. As regards *William* the material facts are these: He attained twenty-one, and married and had one child only, who died without having

any issue (having in fact died in infancy) during the lifetime of his father. Then *William* died leaving no issue of any degree living at his death. One of the claimants to the fund is the representative of *William's* deceased child (who is the petitioner in one of these petitions), claiming the legacy as having vested in *William's* child, and not having become divested. The other claimants are the two surviving children of the testator, who claim under the gift over.

1852.
WESTWOOD
v.
SOUTHEY.

There might be a third alternative, for which, however, no one has contended, viz. whether the residuary legatees are not entitled? whether, if *William's* child took no vested interest, and if the remainder over is void, the residuary legatees did not take? This was not argued, but it is a possible construction.

In order to determine the question before me, the matter divides itself for consideration into two parts: firstly, whether, under the previous gift, *William's* child took a vested interest? If he did not, the second point does not arise. If on the other hand *William's* child did take a vested interest, then it is material to consider the second point, viz. what is the effect of the gift over, in the event of *William's* dying without leaving any issue living at his death?

On the first point, whether the interest of *William's* child vested, it has been contended that in this case there is no gift of the *corpus* of the stock until the death of *William*; that the gift to *William* is only of the dividends and interest; that the gift to his children is only to take effect upon his death; that that is the first gift of the principal, and that therefore *William's* child did

1852.
WESTWOOD
v.
SOCIETY.

not take a vested interest. For this the authorities cited were, *Billingsley v. Wills* and *Battsford v. Kebbell*.—[The Vice-Chancellor stated the facts of *Battsford v. Kebbell* and continued:] The question there was, whether *R. Eady* had a vested interest; and it was held, and quite justly, that he had not, because the language of the will showed that the testatrix did not mean him to take anything but the dividends, unless he attained the age of thirty-two.

Billingsley v. Wills is a little more complicated, but the principle can be easily perceived.—[The Vice-Chancellor referred to the terms of the bequest in *Billingsley v. Wills*, and proceeded:]

When the testator in that case made his will, his brother *Capt. Billingsley* had three children, one son and two daughters, and Lord *Hardwick* said no child could have a vested interest until the death of the father, *Capt. Billingsley*. In the first place, the eldest son was to be excluded; that is clear from the passage: "But my express will and meaning is that no elder son," &c.; and if there should be no son, but only a daughter, then the eldest daughter was to be excluded. Lord *Hardwick* said the words "living at his decease" applied not only to the passage "if there be only daughters," but to the preceding words, "in case there shall be more than one son." Therefore the limitation over was to a class of persons which could only be ascertained at the death of *Capt. Billingsley*.

These cases have very often been relied upon in support of a proposition, which they do not at all establish, viz. that if in the first instance there is a gift of dividends only, and then the gift of the principal, with a

limitation over, for that reason only, there is no vesting. That principle is not, in my opinion, established by these cases; and to show that there is no such principle, I refer to two cases of *Chaffers v. Abell*, reported in the 3rd Jur. 577 and 578. These cases refer to two different wills; the first, as stated in the marginal note, is this: A testator bequeathed a certain sum of stock to trustees to pay 40*l.* per annum to his daughter for life, and, after her decease, "to pay, assign and transfer the sum of 1,000*l.* stock equally amongst all and every the child and children of his daughter, share and share alike, to be paid and transferred to them when and so soon as the youngest should attain his or her age of twenty-one years." At the death of the testator, the daughter had four children, one of whom died before the youngest attained twenty-one; the youngest only survived the daughter. It was held that the four children took vested interests in the stock.

It might have been contended in that case, as in this, that there is no gift of the principal till the death of the daughter; indeed, the argument would have been stronger; for there was not even a gift of the dividends, but only a direction that out of the dividends 40*l.* should be paid to the daughter. It is true there was a gift of the aggregate stock to trustees in the first instance, a circumstance frequently relied upon; but in the next case, in p. 578 of the report in the 3rd Jur., there is no gift to trustees at all, and the case is in fact extremely like this. There the gift was of "the interest of 500*l.*, Navy 5 per Cents., to the textatrix's sister, and at her death the said 500*l.* stock to be divided between her children, share and share alike." The sister had three children at the death of the textatrix,

1852.

WESTWOOD

v.

SOUTHEY.

1852.
WESTWOOD
v.
SOUTHEY.

but only one survived her ; it was held that the three children took vested interests.

Now, that is exactly like this case ; no gift to trustees at all, but a gift to the sister during her life of the dividends of a specific sum of stock, without any gift of the principal, and, after the death of the tenant for life, the principal sum of stock given over.

It is, indeed, seldom that one finds an authority so exactly on all fours with the case before the Court ; but even if there were not that case, I should have come to the same conclusion. *Billingsley v. Wills and Battsford v. Kebbell* have been much misapprehended, as determining that where there is a gift of dividends in the first instance for life, and then on the death of the tenant for life a gift of the principal, that, without more, prevents the vesting of the principal. On the whole, I am of opinion that *W. Westwood's* child took a vested interest at his birth. It must be further observed, in aid of this construction, that, after the gift to the children, there is a direction that the time of payment shall be on their attaining twenty-one, which ordinarily indicates a vested interest.

Then, assuming that there was a vested interest in the child of *William* at his birth, the next point is, what is the effect of the limitation over on the death of *William* without issue ? Does that divest the interest vested ? The words, " upon the death of either of my three children without issue," are capable of three constructions ; the first, that they refer to an indefinite failure of issue ; the second, that they refer to a dying without the particular class of issue before mentioned ;

the third, that they refer to dying without issue living at the death of the person dying.

1852.
WESTWOOD
v.
SOUTHEY.

As to the first construction, if that were the right one, the gift over would necessarily be void, as that gift can only be valid by assuming the dying without issue to be either without leaving issue living at the death, or without the particular issue. And the Court will always lean towards a construction which will give effect to the gift over.

Then do the words mean dying without *such* issue; that is, the issue before mentioned, or dying without issue living at the death? In order to arrive at a conclusion, regard must be had to the fact that the limitation over is not confined to the particular legacy to *W. Westwood*, but is applicable to all the three legacies, the language being this: "Upon the death of either of my said sons or daughter." On the death, therefore, of either without issue, there is a gift over of the interest and dividends, to be payable to such one or two of the other children as shall survive. Now the general rule (not certainly without exception) is, that where there is a gift over to the survivor or survivors of several persons after the death of either without issue, the words "dying without issue" mean without issue living at the death. [His Honor referred to the judgment in *Ranelagh v. Ranelagh*, p. 448 of the report in 2 Myl. & K., and proceeded thus:] In this case there is no larger interest given to *W. Westwood* than for his life; and the limitation over on his dying without issue, is to pay the interest and dividends to the survivors or survivor. There is no mention here, as in *Massey v. Hudson* (a), of

1852.

WESTWOOD
v.
SOUTHEY.

the executors, administrators or assigns of the survivor and it is not a simple gift of the stock, but a direction to pay the interest and dividends to the survivors or survivor; I think the words "survivors and survivor" here must be read in their natural sense, that is, such as are living at the death of *William*. If the word "survivors" meant "others," why did the testator say survivors or survivor? He knows how many children he has; he speaks of them in specific terms as his eldest son, his daughter, and his youngest son; and if both survived, the direction is to pay the dividends to the two; if only one, to pay the dividends to such one, showing a clear intention to confer a personal benefit on the survivors or survivor. For this reason, I am of opinion that the limitation over on the death of any one of the testator's children without issue, refers to the death of any one of them without leaving issue living at his death.

The remaining question is, how does this conclusion affect the construction of the word "issue" in the limitation over? It is true, that where there is a legacy to one for life, and after his death to his children, with a gift over if he die without issue, and there is nothing to restrain those words, the words "without issue" are limited to the issue before mentioned. But the ground on which the Court has used violence with the words and interpolated the word "such" is this, that if there were no restriction on the generality of the words "dying without issue," the limitation over would be void; you refer therefore the language of the gift over, to that of the preceding gift, in order to limit the general term "issue" to the particular issue before mentioned. But when the dying without issue is either in terms, or by the proper construction, limited to dying without issue

living at the death, there is no reason for interpreting the words as meaning "such issue as before mentioned." I am not aware of any case in which a legacy to one for his life, with remainder to his children, and a gift over if he dies without issue in the sense of issue living at his death, the limitation has been restricted as if the words had been such issue as before mentioned. Such a construction might in fact wholly defeat the testator's intention; for if the words were construed to mean "such issue," the effect might be this: the tenant for life might have an only child, who might attain twenty-one, marry, and have children, and die before the tenant for life, and then the child and the issue of that child would be excluded.

1852.
WESTWOOD
v.
SOUTHEY.

I am of opinion then that *W. Westwood's* child took a vested interest at his birth; but that that vested interest was liable to be divested by the death of *W. Westwood* without leaving issue living at his death; and that event having happened, the gift over takes effect. This construction does no violence to any of the clauses of the will; it interpolates nothing; it rejects nothing; and it gives to every word used its primary and legitimate sense; moreover, its results would, in any of the events that might have happened, be most in accordance with the testator's apparent general intention.

The two surviving children of the testator are, therefore, entitled to the stock now representing the legacy in question, and one order will be made on both petitions according to the prayer of the petition of the surviving children*

* This case was afterwards heard on appeal before the Lords Justices, but was compromised.

1852:
March 8th.

Nuisance.
Acquiescence.

WOODMAN v. ROBINSON.

A bill was filed by a single parishioner against some of the churchwardens of the parish, alleging an intention on the part of the Defendants to execute works in the church which would be injurious to himself, and praying an injunction. The Plaintiff did not allege any right of property in a particular pew, but did allege that he was a parishioner, and that he was in the habit of attending divine service in the parish church.

Query, whether this is a private nuisance, and whether such a bill can be sustained by a single parishioner against the churchwardens.

A Plaintiff complained of works intended to be executed by the Defendants, churchwardens of his parish, which he alleged, in the way in which it was proposed to execute them, constituted a nuisance; much negotiation took place, in the course of which the Defendants showed a continued acquiescence in the suggestions made by the Plaintiff as to the mode of executing the works, and suspended their execution. While these negotiations were still going on, and before any works were commenced, the Plaintiff filed his bill for an injunction, and obtained special leave to give notice of motion, and served the notice of motion. On the day following the service of the notice of motion, the Defendants, in order to avoid litigation, passed a resolution at a vestry, at which the Plaintiff was present, that the works should be wholly abandoned. After that the Plaintiff brought on his motion. Held, without going into the question whether there would be any nuisance, that, under the circumstances, the motion was useless and improper, and it was refused with costs.

THE bill in this case was filed by *Woodman*, a parishioner of the parish of *Morpeth*, against three, not being the whole number, of the churchwardens, and there were no other parties to the suit. The object of the bill was to have an injunction to restrain the Defendants from warming the parish church by means of hot air or hot water pipes, which it was alleged they intended to lay under the floor of the church; and it was alleged that great injury to health would be thereby produced, by reason of the earth beneath the floor of the church being filled with graves. The Plaintiff alleged by his bill that he was a parishioner, and that he was in the habit of attending the parish church, but he did not allege any specific title to a pew.

On the question whether a nuisance would be created by the mode in which it had been proposed to execute the works, there was much conflict of evidence, on which it is not material to state anything further, as the decision turned on other facts fully stated in the judgment.

1852.
WOODMAN
v.
ROBINSON.

Mr. *Stuart* and Mr. *Bates*, for the motion.

Mr. *Malins* and Mr. *Dickenson*, for the Defendants, objected to the form of the suit, that it was defective for want of parties. If the bill proceeded on the ground of private nuisance, the Plaintiff must show an injury to property; but he did not show that he had any right of property, for he did not allege title to a pew; and the mere right of user of a church is not a right of property. If the bill proceeded on the ground of public nuisance, the Attorney-General ought to have been a party.

Mr. *Stuart*, on this point, referred to *Spencer v. London and Birmingham Railway Company* (a).

The VICE-CHANCELLOR :

On this application one serious and material question arises, viz. how far such a bill can be entertained by a single parishioner against the churchwardens. If my decision were to turn on that point, I should take time for looking into the authorities. At present I consider

(a) 8 Sim. 193. See on this point *Haines v. Baker*, Amb. 158. A parishioner has a right to a seat in the parish church; and he can proceed against the churchwardens to enforce such right in the Ecclesiastical Court: see *Walter v. Gunner and Driver*, 1 Hag. Cons. 317; and see also *per Sir J. Nicholl* in *Fuller v. Lane*, 2 Add. 425, 426.

1852.
WOODMAN
v.
ROBINSON.

it a very doubtful question whether a single individual can sustain such a bill. However, on the circumstances of this case I am of opinion that I can decide it without determining that point.

The injunction sought is to restrain the churchwardens from proceeding with a plan entertained, and originally intended to be carried into effect, for warming the parish church, by means of hot water pipes to be laid under the floor of the church. That plan, in its original form, was brought to the attention of the select vestry on the 5th of November 1851. Of the meeting of that vestry notice was duly given, and at that meeting a statement of the expenses was made, and the plan was fully explained by the rector to the members, and no objection was made; on the contrary, the plan was approved, and a rate was made by the vestry to defray the expenses. The Plaintiff was not, it is true, shown to have been present, nor was any special notice served on him. However, the churchwardens considered the plan desirable; nobody objected; and the churchwardens determined to carry it into effect.

In pursuance of the resolutions of the vestry, the churchwardens entered into a contract with a person named *King*, to carry into effect the plan, which was this:—to lay the pipes which were to contain the hot water, in a casing of brickwork, so as to separate the pipes from the soil under the floor of the church, by brickwork. On the 5th January 1852, that is, two months after the resolution come to by the vestry, the Plaintiff, himself a parishioner, had an interview with one of the churchwardens, and suggested objections to the plan, and this was the first time the churchwardens heard of there being any objection. On the 6th January, *Wilkinson*, one of the

1852.
WOODMAN
v.
ROBINSON.

churchwardens, received from the Plaintiff a letter addressed to the churchwardens, and stating in substance that the ground of objection to the plan proposed was, that the soil in which it was intended to lay the pipes, was full of the *debris* of dead bodies. After conversing with the other churchwardens on the subject, *Wilkinson* called on the Plaintiff on the 6th January, and explained to him fully the intended plan, and the precautions which it was proposed to take. The Plaintiff stated himself not satisfied, and *Wilkinson*, on behalf of the churchwardens, expressed their surprise at the objections, when the Plaintiff replied that he had spoken on the subject to the rector a month before, so that it seems the Plaintiff had known of the intended plan a month before he made any objection to it. However, in consequence of the Plaintiff's objections, the churchwardens agreed not to commence their works, but to lay a statement of the case before the General Board of Health; and they did accordingly prepare such a statement and lay it before the Plaintiff himself for his approval, and for him to forward it to the Board; he did approve it with some slight alterations, and himself sent it to the Board of Health; and an answer was sent to him dated the 15th January, which he communicated to the churchwardens on the 20th. The material contents of this answer were to the effect, that the Board did not entirely approve the plan of the churchwardens, and they suggested certain alterations. It was natural to suppose when the opinion of the Board was thus invited and given, that the Board meant that if their plan was adopted, the apprehended mischief would be avoided; accordingly, the churchwardens, acting upon that supposition, abandoned their old plan, and adopting that of the Board, arranged with their contractor to proceed according to the opi-

1852.
WOODMAN
v.
ROBINSON.

nion of the Board; the Plaintiff, however, considered that the Board did not mean to say that their plan would be sufficient.

On the 21st January, *Wilkinson* called on the Plaintiff, and left word that the plan of the Board of Health would be adopted. The Plaintiff on the same day gave notice to the contractor not to proceed, and on the following day a similar notice to the churchwardens; on the same day, the Plaintiff saw one of the Defendants and stated to him that the opinion of the Board of Health was not clear, and added that Mr. *Charlton*, another churchwarden, suggested another meeting of the vestry. The Defendant upon this proposed that a second letter should be sent to the Board, and that was supposed to be the arrangement; nothing at least passed from which the Plaintiff could infer that the Defendants intended then to carry out their plan as first amended by the Board. On the 22nd January, *Wilkinson* wrote to the Board, and asked whether their plan might safely be adopted; and in the mean time suspended all proceedings and issued notices for a further vestry meeting. The earliest day on which they could meet was the 29th. On the 25th, the Sunday following the issue of the notices, notice was put up on the church door, and also at another church, so that every one concerned might know of the intended meeting.

Up to this point, there was no ground for the Plaintiff to say that there was that degree of danger, that unless a bill was filed and special leave obtained to give a notice of motion, such mischief would ensue as would entitle him to an injunction. On the 27th of January the position of the parties was in fact the same as it had been from the beginning; both parties up to that time

acting properly; the Plaintiff making objections; the churchwardens, with great consideration for a single individual objecting, suspending their operations, and doing what he required, and sending to the Board of Health for their opinion.

1852.
WOODMAN
v.
ROBINSON.

Can I say then that on the 27th, matters were in such a state, that the peremptory interference of the extraordinary jurisdiction of this Court was requisite, and that it was necessary that a bill should be filed, and a notice of motion served on special leave obtained on the ground of imminent danger? There was no ground for any apprehension of danger on the Plaintiff's part on the 27th January (that is, danger of the Defendants proceeding with their works); and it is not denied by the Plaintiff that when he filed his bill, he knew that notices for a meeting on the 29th had been issued, and that there had been a further application for the opinion of the Board of Health. There was in fact nothing to justify any apprehension that anything would be done by the churchwardens with the works, until after the meeting of the 29th. Nevertheless, on the 27th, the Plaintiff wrote to the Defendants that a bill was filed; and in that letter called on the Defendants to give a pledge that no further steps would be taken, and stated that if such a pledge were not given, further proceedings would ensue. On the 28th, *Wilkinson* replies, that as there was to be a meeting on the 29th, and as the churchwardens would in a great degree be guided by the conclusion come to by the vestry, he could not before the 29th say that the churchwardens would give any positive pledge that they would not adopt any plan. The Plaintiff had no right at that time to exact such a pledge, and ought to have waited till after the 29th, and till the further answer of the Board of Health had been received. He knew

1852.
WOODMAN
v.
ROBINSON.

that no work was actually done, and that the proceedings had been suspended at his own instance. Nevertheless, on the 28th, counsel applied for leave to give a special notice of motion on the ground of danger. Now there was, as I have said, no ground for any apprehension of danger at that time. On the 29th, the answer of the Board of Health came, and the substance of it was to add to their former suggestions, a recommendation that every part of the floor of the church should be closed carefully, otherwise effluvia might arise ; and they added that even the heat caused by the presence of the congregation, might itself cause the generation of effluvia. This answer having been received, the vestry held its meeting, at which the Plaintiff and the Defendants were present ; and a resolution was then come to that, in consequence of the proceedings taken by the Plaintiff, and to avoid expense, the whole project should be abandoned. This resolution is said by the Plaintiff to be an admission by the Defendants that the Plaintiff was right throughout ; but I think that is not so ; it was merely that rather than incur expense and litigation, the vestry would abandon their works.

On the same 29th January, a copy of the resolution was given to the Plaintiff ; on the 31st was the sale ; and the motion of which notice had been given was mentioned, when counsel for the Defendants asked that it might stand over. By this time the Plaintiff ought to have felt that he had been hasty. On the 6th February the Defendants made an offer to put an end to the case, on the terms of each party paying his own costs. The Plaintiff refused to compromise, unless his outlay was paid to him ; otherwise, he insisted on going on with his bill, although the works were abandoned. The motion was therefore made, not for the purpose of

obtaining an injunction, but in reality to have it decided that the Plaintiff had a right to an injunction on the 31st, in order to entitle him to his costs.

1852.
WOODMAN
v.
ROBINSON.

If an injunction were granted in this case, it would be an injunction to restrain the Defendants from doing acts which they never had any intention of doing, except in the performance of their duty, and which they have, in pursuance of the Plaintiff's suggestions, formally resolved not to do at all. And I am of opinion that the injunction must be refused. The only remaining question is as to the costs of the motion. I am clearly of opinion that the motion was uncalled for; it was a motion to restrain parties on the ground that they intended to do wrongful acts. At the time when the notice was given, and when the motion was brought on, there was no intention on the part of the Defendants of doing the alleged wrong; they were, on the contrary, doing what was quite right; they were attending to the Plaintiff's objections, and doing all in their power, with the Plaintiff's concurrence, to have it ascertained by application to the Board of Health, what was the best course for them to pursue. On the whole I think this motion must be refused with costs (a).

(a) See on this subject *Millington v. Fox*, 3 Myl. & Cr. 338; *Geary v. Norton*, 1 De G. & Sm. 9.

1852 :
March 29.

STAPLETON v. STAPLETON.

Will.
"And" read
"Or."
Annual Profits.

THIS was a special case upon the construction of the will of *Thomas Stapleton*, taken in connection with a deed of settlement dated the 7th June 1826.

Testator, tenant for life under a settlement of the *B. H.* estate and other lands, remainder to his first and other sons in tail male; remainder to *A.*, his brother, for life, with remainder

Under the settlement, *T. Stapleton* was, at the time of making his will, tenant for life of the manor of *Berwick Hill* and other lands, with remainder to the first and other sons of his body successively, and the heirs male of the respective bodies of such sons, remainder to *Gilbert Stapleton* (the Plaintiff), a brother of *T. Stapleton*, for life, with remainder to his sons in tail male;

to his first and other sons in tail male; remainder to other brothers of the testator in like manner; and after other intermediate limitations, remainder over to the sisters of the testator as tenants in common in tail general.

The testator by his will gave certain specific things to be enjoyed by the person or persons who for the time being should be entitled to the freehold or inheritance of the family estate at *Stapleton*, as and in the nature of heir-looms. He gave his furniture, plate, &c., to his brother *A.* He directed a sum of 1000*l.*, secured to him on the *B. H.* estate and other estates, to sink into the freehold and inheritance of the said estates, that the same might merge them; and the rents and arrears of rent, with timber felled, and other annual profits due to him at the time of his decease from the *B. H.* estate, unto the person or persons who should be entitled to the freehold AND inheritance of the same estate, in possession on his decease. He gave his residue to his two brothers *B.* and *C.*; and he appointed his brother *A.* his sole executor. *B.* died in the testator's lifetime.

Held, first, that in the gift of the rents, &c., the word *and* must be read *or*, and that they passed to *A.*, although he was entitled only to the freehold; secondly, that certain prepared brick earth dug out of the estate by the tenant for life, and lying upon it at his death, and certain tiles so made and remaining on the estate, were comprised in, and passed by the words *other annual profits*; thirdly, that certain apportionable parts of the rents which, under the Apportionment Act, went to the testator's executor as part of his assets, passed under the words *due to him at the time of his decease*.

remainder to other brothers of *T. Stapleton* and their sons in tail male in like manner; and after other limitations, there was a limitation over to the sisters of *T. Stapleton* as tenants in common in tail general.

1852.
 STAPLETON
 v.
 STAPLETON.

T. Stapleton made his will on the 3rd January 1841, which was, so far as is material to the points decided in this case, in the words following:—

“I give and bequeath to my executors, hereinafter mentioned, all my plate marked with the family arms and crest, or either of them, and also all my books, manuscripts, maps, pedigrees, and library, and all other my property of a like nature, in trust to permit and suffer the same to be held, used, and enjoyed by the *person or persons who for the time being shall be entitled to the freehold or inheritance of the family estate of Stapleton*, in the township of *Carlton*, in the said *West Riding* of the county of *York*, as and in the nature of heir-looms, and for that purpose to cause inventories thereof to be made at the expense of my personal estate; and I direct that one copy of such inventory shall be signed by my said executor, and another copy thereof shall be signed by the person who for the time being shall be entitled to the possession of the freehold or inheritance of the said family estate of *Stapleton*. And I do hereby declare my will and mind to be that no person or persons who shall be tenant in tail or tenant in tail male of the said family estate, shall be entitled to an absolute vested interest in the said legacy, unless he or she shall live to attain the age of twenty-one years, or die under that age leaving lawful issue living at the time of his or her decease; but so nevertheless that such tenant in tail male shall be entitled to the use and enjoyment of the said legacy during his or her minority. I bequeath all and singular

1852.
STAPLETON
v.
STAPLETON.

my household furniture, pictures, china, linen, glass, and other effects whatsoever (except plate and plated articles, money and securities for money), being at the time of my decease in or about the house of my late father *Thomas Stapleton*, called the *Grove*, at *Richmond*, in the *North Riding* of the said county of *York*, or in or near the town of *Richmond* aforesaid, to my brother *Gilbert Stapleton*, his executors, administrators, and assigns, to and for his and their own use and benefit. I bequeath to my said brother my silver gilt dressing-case. I bequeath all and singular my plate and plated articles which I shall be possessed of at the time of my decease, and not hereinbefore by me bequeathed, to my brother *John Stapleton*, his executors, administrators, and assigns, to and for his and their own use and benefit. I direct the sum of 1000*l.*, or thereabouts, now secured to me on mortgage of the *Berwick Hill* estate, in the said county of *Northumberland*, and certain estates at *Drax*, or elsewhere, in the county of *York*, or some or one of them, or some parts thereof, to sink into the freehold and inheritance of the said estates respectively, so that the same estates may thenceforth be absolutely freed and discharged from the said mortgage debt and all interest in respect thereof, and the same mortgage and interest may merge in the freehold and inheritance of the same estates respectively. I bequeath all the rents and arrears of rent, with timber felled, and other annual profits due to me at the time of my decease from my *Berwick Hill* estate, unto the person or persons who shall be entitled to the freehold and inheritance of the same estate in possession at my decease. And as to all the rest, residue, and remainder of my personal estate and effects, whatsoever and wheresoever, I bequeath the same unto my brothers *Henry Stapleton* and the said *John Stapleton*, their executors, administrators, and

assigns, for their absolute use and benefit. And, lastly, I do hereby appoint my brother, the said *Gilbert Stapleton*, sole executor of this my will."

1852.
STAPLETON
v.
STAPLETON.

T. Stapleton died on the 3rd of December 1849, a bachelor, at the age of forty-three. The Plaintiff, *Gilbert Stapleton*, was his next brother, and was two years younger than the testator. He was also unmarried at the date of the will. The yearly rent of the *Berwick Hill* estate was, in 1849, about 1707*l.* 11*s.* 5*d.*, and due at May day, and *St. Martin's* day. Certain parts thereof were let upon lease for seven years, from May day 1843, and the rent made payable May day and *St. Martin's* day. And other parts were let by parol at yearly rents, payable on the 13th May and 23rd November. There were rents and arrears of rents thereof up to *St. Martin's* day 1849, to the amount of about 1035*l.* due to the testator, *T. Stapleton*, at his death, and certain rents to a small amount accrued due between *St. Martin's* day 1849, and the time of the death of *T. Stapleton*; there was also upon the *Berwick Hill* estate, at the time of the testator's death, a considerable quantity of tiles and bricks, which had been burnt in a kiln built upon the estate about a year before the death of the testator, and had been made out of earth and clay taken out of the estate; and there was also a certain quantity of prepared brick earth or clay for the purpose of making bricks, dug out of the estate and standing upon it. Tiles made in a similar manner had, in the lifetime of the testator, been used for draining parts of the estate. Certain of the remaining tiles upon the estate at the death of the testator, had been made for the purpose of being used in draining the estate, and all the tiles and bricks and brick earth or clay were made or prepared during the year preceding the death of the testator. *Henry Stapleton*,

1852.

STAPLETON

v.

STAPLETON.

one of the residuary legatees named in the will, died in the lifetime of the testator.

The case for the opinion of the Court was, Whether the Plaintiff, or the Defendant, the surviving residuary legatee, was entitled to the said rents and arrears of rent of the said *Berwick Hill* estate, due and owing to the said testator, *T. Stapleton*, at his death, and to the rents from *St. Martin's* day 1849, until his death; and whether the said Plaintiff or Defendant was entitled to the said bricks and tiles, and the said brick earth and clay.

Mr. Fleming, for the Plaintiff *Gilbert Stapleton*.

The point is, whether in the clause of the will giving the rents and arrears, the word *and* should be read *or*. On the death of *T. Stapleton* there was nobody who was entitled to the freehold *and* inheritance of the *Berwick Hill* estate. To carry the general intention into effect, "and" will be construed "or": *Jackson v. Jackson* (a). Here the intention will not be carried out if the word "and" is read in its usual sense; for if you so read it, the testator must die intestate as to any special gift of the rents. I admit that the construction contended for is not the only possible one, but it is the most reasonable: *Maberley v. Strode* (b), *Bell v. Phyn* (c), *Wilson v. Bayley* (d).

In this case, in the first part of the will when the plate is given as heir-looms, the word *or*, the proper word, is

(a) 1 Ves. sen. 217; 1 458; 1 Pow. Dev. ed. Jarm. Shep. Touchst. ed. Atherley, 384, note.

85, n.

(b) 3 Ves. 450.

(c) 7 Ves. 453; see p.

(d) 3 Bro. P. C. ed. Tomlinson, 195.

1852.
 STAPLETON
 v.
 STAPLETON.

used ; so, in the direction to merge the mortgage, the word *and*, which for that purpose is the proper word, is used. In the gift of the rents the word *or* would be the proper word to carry the obvious intention into effect, and the Court will assimilate for that purpose the language of the latter clause to that of the former, and read the word “ and ” as “ or ”: *Stubbs v. Sargon (e)*. When *T. Stapleton* made his will both he and his brothers were unmarried. He says the person or persons who shall be at his death entitled to the freehold and inheritance, is or are to be entitled to the rents. Now, he could not have contemplated that under this gift, if his death had happened immediately after making his will, any one except his brother *Gilbert* should take ; for if *Gilbert* was then living, there would be no person capable of taking strictly under the description of being entitled to the freehold *and* inheritance. To satisfy these words strictly, he must have contemplated the deaths of all his brothers in his lifetime, and that his sisters should take, as having the freehold and inheritance under the ultimate limitation to them : but this could not be the state of things contemplated by him ; he clearly based his whole will on the supposition that *Gilbert* would survive him, for he makes him his executor ; he knew that if *Gilbert* survived him, he would come into possession of the freehold as tenant for life, and not into the inheritance. He must therefore be taken to have intended to include *Gilbert* under the words used by him, and that intention is effectuated by reading the word “ and ” “ or.”

It is immaterial that he has used the proper word “ or ” in the gift of the plate : words may be construed differ-

(e) 2 Keen, 255, see p. 273.

1852.
STAPLETON
v.
STAPLETON.

ently in different parts of a will : . *White v. Briggs* (f). Secondly. As to the rents accruing due after the testator's death, so much of them as arose upon the demises under written instruments is apportionable. The bricks, tiles, &c., pass as annual profits, though not strictly profits arising every year. The testator expressly includes in annual profits the timber felled, which is not a profit accruing every year.

Mr. *Bates*, for the Defendant *John Stapleton*, the residuary legatee.

The testator was himself a barrister, and knew the legal effect of the words used. In the earlier part of the will, when, in a gift of things to be enjoyed with the freehold merely, he uses the words freehold or inheritance, he shows that he knew and had in his mind, the difference between the inheritance and the mere freehold. To construe the words, it is not the events that have happened that are to be looked at, but those which might have happened. The estate was so settled under the deed of 1826, that it might have vested in possession at the testator's death upon the sisters, who as tenants in tail in possession would have satisfied all the words of the will. We are not to assume that a testator has immediate death in his contemplation, in order to arrive at the construction of his will. In this case it was much more likely, having regard to his age, that the testator would contemplate the possibility of his surviving his brothers. That there was no person at the testator's death answering the description actually used, is no reason for altering the will. If all the brothers had died living the testator, an event which he must have been taken to have

contemplated as at least possible, there would have been persons having the inheritance *and* the freehold of the *Berwick Hill* estate, and all the words of the will would then have been satisfied.

1852.
STAPLETON
v.
STAPLETON.

Mr. *Fleming*, in reply.

The contention of the Defendant that the testator contemplated the deaths of all his brothers before his own, is inconsistent with his having made *Gilbert* his executor. I admit that all the words of the will must be satisfied, but that can only be done by adopting the construction for which I contend. The words used are "the person or persons." If *Gilbert* succeeded, the word person in the singular would be satisfied. The word *persons* would be satisfied if the sisters succeeded, but not the word person. If the succession of the sisters only was contemplated, the word freehold would have been unnecessary; for the sisters taking the inheritance in possession would of necessity take also the freehold; and the testator must not be taken to have used the word freehold unnecessarily, or without attaching to it any meaning, and to give it a meaning and use, the word *and* must be construed *or*.

The VICE-CHANCELLOR :

In this case, looking at the whole of the will, it is clear that the testator's intention was to give different portions of his property in different ways. He was a bachelor; his brothers were all bachelors. He had sisters who had, under the settlement, an ultimate limitation to them; that is, each of his brothers would take successively an estate for life, with remainder to his sons in tail, and with an ultimate limitation over to his sisters, as tenants in common in tail.

1852.
STAPLETON
v.
STAPLETON.

Now, first, as to his plate marked with his crest, and all in fact that he treats as heir-looms, he gives it to the person or persons who for the time being shall be entitled to the freehold *or* inheritance of the family estate of *Stapleton*, &c. "as and in the nature of heir-looms." Here he uses the word *or*, and he meant those subjects of his gift to go to those persons in succession who should be in the enjoyment of the possession of the estate. About that there cannot be much doubt. Then he gives his furniture, &c., except his plate and plated articles, money and securities for money, to his brother *Gilbert*, his executors, administrators and assigns, and he gives him certain other chattels, and then he gives all his plate, other than those before given by way of heir-looms, to his brother *John*, who was his third brother. Then there was a mortgage, as to which he directs that it shall sink into his estate, in order that it may merge in the freehold *and* inheritance, and immediately after that comes the clause on which the question turns. [The Vice-Chancellor read the clause stated in p. 214.]

Now, if according to the strict meaning of the words, the word *and* were here to receive its natural construction, the subject of this bequest could go to no one except a person entitled, not only to the freehold, but to the freehold and inheritance. Now, the only event in which a person, in the singular, could be entitled to the freehold and also to the inheritance, would be in case of the brother of the testator, who would be the next tenant for life, dying in his lifetime, and leaving a son who would be the first tenant in tail. And the only way in which persons, in the plural, could take, would be in the event of all the testator's brothers dying in his lifetime without leaving issue, and then his sisters under the ultimate limitation, would be entitled as

tenants in common in tail. Now, it cannot be said that he may not have considered the happening of these events as possible; on the other hand, it is clear that neither of those events is that which he contemplated as most probable at his decease; for, in either of those events happening, he must have supposed his brother *Gilbert* would be dead; and he obviously does not consider that a probable event, because he not only gives him certain specific articles, but appoints him sole executor of his will. That circumstance, though not conclusive, shows that he contemplated *Gilbert's* surviving him. Now, it is extremely improbable that he meant that, if his brother *Gilbert* survived him, not only *Gilbert* should not take the rents, but nobody should take them; and nobody could take them if *Gilbert* surviving is excluded, because there could be nobody then having the freehold *and* inheritance. What the testator meant was, that when he died, the rents should go to the person or persons who should next succeed him in the enjoyment of the estate. I am not going at all beyond the authorities in saying that in this case, *and* must be read *or*. I think the testator used it in error, and the error arose probably in this way:—In the preceding clause, the testator used the word *and* correctly, and then immediately following that clause, comes the one on which this question arises, and the testator appears inadvertently to have used the same word. I am of opinion that *Gilbert* having survived, although only entitled to the freehold, is entitled to whatever ought to be held to pass under the words, “all the rents and arrears of rents;” and the next question is what passes under those words. Now, at the death of the testator, there was not only rent accrued due previously to his death, but current rent for the half year following his death under demises. It is clear that, under the Apportionment Act of 1834, rent

1852.
STAPLETON
v.
STAPLETON.

1852.
STAPLETON
v.
STAPLETON.

reserved under written instruments is to be apportioned ; that is, the legal personal representative of the testator is entitled to an apportioned part. But here the question is, Whether, under the will, the apportionable part passed. In one sense, under the words "rent due," the portion of rent apportionable was not due at the death. But the Act speaks of executors, and vests the rent in the representatives of the tenant for life, as part of his assets. I think it would be unreasonable to hold that, by the words used, the testator meant only "what is due to me." He meant what was due to him as part of his assets ; therefore, although there may perhaps be a question, I think the apportionable part of the rents reserved under written instruments, did pass. The only remaining question is as to the tiles and bricks made on the estate from the soil of the estate, and the brick earth prepared. Do these things pass under the words "other annual profits due to me"? Now, the testator gives himself a key to his meaning, by the words immediately preceding, "*with timber felled.*" Timber is not necessarily annual profits, but here the testator shows that he means it to be taken as annual profits, and there is a close analogy between that and the other profits which he was entitled to receive, although not profits accruing every year. That is the case with the tiles, brick earth, &c., which he was in the habit of taking as part of the profits of the estate, and which the person succeeding him would be entitled to take. I think the fair construction is, that the tiles, bricks, and brick earth do pass.

PIDDUCK v. BOULTBEE.

IN this case a motion was made on behalf of one Dr. *Wardell*, describing himself in the notice of motion as, and being in fact the next friend of the infant Plaintiffs in the suit, to discharge, on the ground of irregularity, an order made as of course at the Rolls, for changing the solicitor of the Plaintiffs. The bill was filed by *Elizabeth M. Pidduck* and *Sarah Pidduck*, both adults, and by four infants, for whom *E. M. Pidduck* had been originally the next friend. In December 1851, an order had been obtained from Vice-Chancellor *Kindersley*, for changing the next friend, and substituting Dr. *Wardell* for *E. M. Pidduck*. On the application for this order, *E. M. Pidduck* appeared by Counsel, and the order was duly drawn up, passed, and entered. Afterwards the order complained of was obtained at the Rolls by the adult Plaintiffs, on a petition of course, which purported to be presented in a cause entitled, The suit of the adult Plaintiffs and of the infant Plaintiffs by their next friend *E. M. Pidduck*, and stated the order made for changing the next friend, but incorrectly stated that it had never been drawn up, passed, or entered.

Mr. *Stuart*, for Dr. *Wardell*, now moved to discharge the order at the Rolls.

1852:
April 19.
Practice.
Irregularity.
Motion by
Infants.

In a suit by adults and infants, the next friend was changed by an order of the Court, on the application for which the original next friend appeared. The adult Plaintiffs obtained an order of course at the Rolls for changing the solicitor, on a petition representing the original next friend as next friend, and stating incorrectly that the order changing the next friend had not been drawn up, passed, or entered. Held:

that the order so obtained at the Rolls was irregular. A motion by the next friend of infants, describing himself as such in the notice of motion, is irregular. The motion should be by the infants by their next friend.

1852.

PIDDUCK
v.
BOULTBEE.

Mr. *Follett*, for trustees in the same interest.

Mr. *Wilcock* objected, on behalf of the adult Plaintiffs and the infant Plaintiffs, alleged by the adult Plaintiffs to be still represented by the original next friend, that the motion could not be heard on behalf of Dr. *Wardell*, as the next friend. That he was no party to the suit, and could not move; secondly, that if he could be heard, the order at the Rolls was not wrong, for that *E. M. Pidduck* had not authorized the appointment of a new next friend; and he read an affidavit by her to support this statement.

Mr. *Stuart*, in reply, on the question of form said, the next friend on being appointed subjected himself, by the very order appointing him, to costs, and therefore had a right to be heard on the question what solicitor was to conduct the Plaintiffs' cause.

The VICE-CHANCELLOR :

As to the question whether the order at the Rolls was regular, I am clearly of opinion that it was not. It was obtained on a suggestion representing *E. M. Pidduck* as the next friend of the infant Plaintiffs, and representing also that the order of December 1851, had not been duly drawn up, passed, and entered; both of which suggestions were untrue. The order would, therefore, be discharged, if the application to discharge it were made by the parties having a right to move. Now, on the question whether a next friend may, simply as an individual, ask for any order, I will not say that under no circumstances a next friend can be so entitled; but certainly the general rule is, that a next friend can only apply as such, or rather that the application is the application of the infants by their next friend.

In this case, after the order of December 1851, Dr. *Wardell* was the next friend of the infant Plaintiffs, and the suit was constituted thus:—There were two adult Plaintiffs, *E. M. Pidduck* and *S. Pidduck*, and four infant Plaintiffs by Dr. *Wardell* their next friend. Now, the solicitor on the record is the solicitor of all the Plaintiffs,—of the infant Plaintiffs by their next friend, as well as of the adult Plaintiffs. When, therefore, the adult Plaintiffs, behind the back of the next friend, obtained an order to change the solicitor, they infringed on the rights of the infant Plaintiffs, and the infants are the parties who should come to the Court to complain. The next friend has no title to do so as an individual, but only as representing the infants. The application here is by their next friend, as an individual. It should have been by the infant Plaintiffs, by their next friend. On this technical ground only, I must hold the objection to the motion good, and refuse the motion with costs.

1852.
 PIDDUCK
 v.
 BOULTBEE.

1852:
30th April and
1st May.

Will.
Gift, whether
specific or resi-
duary.

Repugnancy.

A testator gave various specific portions of personal estate to his wife *for and during her natural life, if she should so long continue his widow*; but at her death, or in case she should marry again, then he gave all the things before given, adding the words "and effects, and also all my household furniture, which I hereby give to her for her sole use and benefit for and during the term of her natural life, if she shall so long continue my widow," to be equally divided among *the children that he then had or might thereafter have by his said wife*; but in case his wife should not marry again after his decease, he gave her "all and every his personal estate and effects whatsoever" for her life, and the same to be equally divided to and amongst *such of his children as should be living at her decease*, share and share alike. The testator died within three weeks after making his will.

Held: first, that the first gift was not merely specific, but passed the whole of his personal estate; secondly, that the two clauses were not repugnant, but the first was intended to apply to the case of the widow marrying again, and the second to the case of her not marrying again; and the latter event being that which happened, the children living at the death of the widow were alone entitled, to the exclusion of representatives of deceased children.

WIGGINS v. WIGGINS.

THIS was a petition in a suit for the administration of the estate of *Clark Wiggins*, the testator. The will was as follows:—

"This is the last will and testament of me *Clark Wiggins* of *Blewett's Buildings, Fetter Lane*, in the city of *London*, working jeweller; being of sound mind, memory, and understanding. First, I will and direct that all my just debts, funeral expenses, and the expenses of proving this my will be fully paid and discharged by my executrix, hereinafter named, as soon as conveniently may be after my decease. And I hereby give and bequeath to my dear wife, *Ann Wiggins*, all and every my stock in trade and implements of every description whatsoever, and also all my book debts, sum and sums of money due or owing to me from any person or persons whomsoever,

all the ready cash that may be in my house at the time of my decease, money in the public stocks or funds, bills, bonds, notes, or other securities whatsoever, *for and during the term of her natural life, if she shall so long continue my widow.* But it is my mind and will that *at her death, or in case she marry again after my decease,* then that the said stock in trade, monies, debts, and effects, *and also all my household furniture,* which I hereby give to her for her sole use and benefit for and during the term of her natural life, if she shall so long continue my widow, shall belong to, and I do hereby give and devise the same to be equally divided to and among *the children that I now have or may hereafter by my said wife,* to be equally divided between them, share and share alike. But in case my said wife, *Ann Wiggins,* shall not marry again after my decease, then I do hereby will and direct that she shall peaceably have and enjoy, and I do hereby give and bequeath to her *all and every my personal estate and effects whatsoever,* for and during the term of her natural life, and the same to be equally divided to and amongst *such of my children as shall be living at her decease,* share and share alike. And I do hereby appoint my said dear wife sole executrix of this my will; hereby revoking all former wills by me at any time heretofore made."

1852.

WIGGINS

v.

WIGGINS.

The will was dated the 17th September 1809; the testator died almost immediately after the date of his will, which was proved on the 5th October 1809. He left his widow and five children surviving, and a sixth child was born three months after his death. The widow died in March 1852, leaving three of the testator's children surviving her, three having died during her life. The petition was presented by the three surviving children to have a sum of 2729*l.* 8*s.* 9*d.*, 3 per Cent. Consols,

1852.

WIGGINS

v.

WIGGINS.

sold, and the proceeds divided in equal shares between the Petitioners. The Respondent was the executor of the mother, who claimed in right of the deceased children.

Mr. Malins and Mr. Eddis, for the Petitioners.

The testator contemplated two contingencies; first, that his wife, for whom he wished to make a provision, should die his widow; and, secondly, that she should remarry. The only way of reconciling the clauses of the will would be that, in case she marries again, the first gift should take effect; but in case she does not, then the second gift should take effect.

[*The Vice-Chancellor.*—What strikes me is, that there is a question whether, in the first bequest, the testator thought he was giving his whole estate. In the first gift to his wife for her life, he does not give his furniture, but at her death or in case she shall marry again, then he gives his household furniture. That not being comprised in the first bequest, suggests the inference that when in the first gift he enumerates various subjects of gift, he did not intend to give his whole personal estate, and he therefore, by a separate clause, gives his furniture. The question is, did he, by the last gift, mean to give his residuary estate, thinking he had not given it by the first?]

Mr. Eddis.

We say that the first clause extends to the whole of the personal estate. The reason for particularly naming the furniture is, that the testator wished his wife to have it in specie. The words are very comprehensive. The first clause uses the word “effects,” a word which will carry

all the personal estate. [He referred to 1 Jarm. 692, and the cases there collected.] The will contemplates the alternative, first, in case the widow shall marry again after his decease; and, secondly, in case she shall not marry again after his decease. If the first clause does not carry the whole personal estate, there would be as to the second gift, an intestacy during the remainder of the life of the wife, if she should marry again. The conclusion is, therefore, that, by the first clause, the testator bequeathed his whole residue. If that be so, then the case becomes one of repugnancy, and upon that the well-established rule is that, if there are two clauses in a will so inconsistent that the repugnancy cannot be got over, then if the second clause comprises a distinct gift, it must prevail over the first. The surviving children are therefore alone entitled. [They cited *Sherratt v. Bentley* (a) and *Morrall v. Sutton* (b).]

1852.
WIGGINS
v.
WIGGINS.

•Mr. *Chandless* and Mr. *Fischer*, for the executor of the widow.

The argument on the other side is, that the first gift is residuary; but it is not so: there are many things that would not be included in the language used; it would not include, for example, railway shares or leaseholds. The evident intention on this will is to provide for all the children. All is clearly specific in the first gift, unless the word *effects* would carry the whole residuary personalty; but though used generally, it would do so, here it is restricted by the antecedent words, and means effects *ejusdem generis*: *Cook v. Oakley* (c), *Rawlings v. Jennings* (d), and *Woolcomb v. Wool-*

(a) 2 My. & K. 149.

(b) 1 Phill. 533.

(c) 1 P. Wms. 302.

(d) 13 Ves. 39.

1852.

WIGGINS

v.

WIGGINS.

comb (e). But if the first gift is residuary and the two clauses repugnant, it is not of necessity that the second is to prevail. If the testator's last intention is to prevail, it is the signature that expresses the last intention, and that restores the first of the two gifts as well as the last. [They referred on this point to Lord *Brougham's* judgment in *Sherratt v. Bentley*. They referred also to *Sims v. Doughty* (f).] The general intention must prevail if it can be collected, whether it be found in the earlier or in the latter parts of the will; and the general intention here is to provide for all the children. (*Morrall v. Sutton.*)

The VICE-CHANCELLOR :

This will is inartificial; but one thing is quite clear as to the intention, viz. that the testator's wife was to have the whole of his personal estate during her life, if she remained his widow; and it is equally clear that after her death or second marriage, his property was to go, either to all, or to a class of his children. There is no doubt also that the widow's life interest was determinable by her second marriage. The last clause is as distinct as possible: "In case my wife shall not marry again after my decease," &c.; and this is the event that has happened. So far it is clear. If the widow remains single, she is to enjoy the whole: "all and every my personal estate and effects whatsoever, during the term of her natural life, and the same to be equally divided," &c. If there were nothing more in the will, it would be quite clear who would take in the event of the widow dying without remarrying; and that is the event that has happened. But then there is the clause contained in the prior part of the will, on which the question arises

(e) 3 P. Wms. 112.

(f) 5 Ves. 243.

whether that prior part does not vary the construction which ought to be put on the plain words of the last clause. Now, by the prior clause, the testator has purported to give, certainly not in terms *all* his personal estate, but various descriptions of personal estate—"all and every my stock in trade" (that is a specific portion of his estate), "and also all my book debts" (another specific portion), "all the ready cash that may be in my house," &c. (another specific portion), and so on; he gives a variety of kinds of personal property, not in terms comprising the whole, and clearly not intended to comprise the whole, for in the very next sentence he mentions other personal property, viz. his household furniture. Thus far he describes particular portions only, and those he gives to her "for and during the term of her natural life, if she shall so long continue my widow;" and then he goes on, "but it is my mind and will that, at her death or in case she marry again after my decease, then that the said stock in trade, monies," &c. (that is, the whole of what he has described before), "and also all my household furniture" (he adds here another specific portion). And then all the things given are to go, not to his children living at her death, but to "all the children I now have or may hereafter have by my said wife." Now, I observe that the testator's will is dated the 17th September 1809; the date of his death is not stated; but I find the will was proved on the 5th October 1809, viz. eighteen days after the date of its execution. I must therefore presume that the testator died almost immediately after making his will. I think I must also presume that his personal estate at the time of his death was the same as at the time of making his will. It is not a strictly necessary conclusion, but it is a fair and reasonable presumption, that the personal estate that he left, and his per-

1852.
 WIGGINS
 v.
 WIGGINS.

1852.

WIGGINS
v.
WIGGINS.

sonal estate at the date of his will, were no other than the particulars he had described ; and therefore I must suppose that in the prior part of his will, although he did not in terms, he did in fact, describe the whole of his personal estate. At the first blush, I confess I thought that, upon the construction of the prior clause, it gave only specific portions, and that the latter clause might be construed as a general residuary clause ; but I think that I must assume that if the said testator had supposed that, by the first clause, he had not given all his property, the subsequent clause would have been expressed by him, if meant to give the remainder, in such terms as " all the residue," or " all the remainder," and not in the terms used, " all and every my personal estate and effects whatsoever." Those words might be construed to be a residuary clause ; but, taking the whole will together, and considering that it is inartificially expressed, and considering the language in which the clauses are introduced, I am of opinion that the fair construction is, that the first clause was meant, though the intention is inartificially expressed, to apply to the case of his widow marrying again ; and the second to the case of her not marrying again ; but in both he meant to deal with the whole of the property. Why he should wish, if his widow did marry again, to make a different disposition with regard to the class of his children to take, from that which he makes in the event of her not marrying again, I confess I do not see any good reason. The testator may, however, have had a reason. He does not appear certainly to have considered that it might have happened that a child might have married and died, leaving children, during the life of the widow, and that such children, if the wife did not marry again, would be unprovided for, upon the construction now given to the first clause. That consideration is, how-

ever, not sufficient to bring me to the conclusion that the prior clause merely gives specific portions of the property; and another consideration which tends to confirm this view is this, that if the latter clause is residuary, and the prior carries only a specific gift, then, in the event of the widow marrying again, the residuary personalty would not be disposed of during the remainder of her life. This is not conclusive, but it aids the construction that I put on this will, that the first clause passes the whole, and is intended to apply to the case of the widow marrying again, and that the latter was only introduced to provide for the case of her not marrying again. I must declare that, in the events which have happened, the whole personal estate is divisible between the three children of the testator who survived his widow.

1852.

WIGGINS
v.
WIGGINS.

1852:

March 22.

*Executors,
power of, to
mortgage Assets.*

*Pleading.
Misjoinder.*

When loans are made to an executor upon his personal security without any security or contract for a security upon the assets being made at the time, and afterwards a security on the assets is given, the Court will not assume that the loan was for the purposes of the administration of the estate, but will direct an inquiry whether it was so applied.

A., the surviving executor of *B.*, filed a bill to set aside a mort-

gage of the assets, made by *C.*, the deceased executor of *B.* *A.* was also the representative of *C.* Held, that *A.* could not sever his character of representative of the original testator, in which he had title to sue, from that of representative of *C.*, in which he could not sue, to set aside his testator's deed; and on this ground the bill was dismissed.

MILES v. DURNFORD.

A BILL was filed by *Miles*, the surviving executor of *John Punter* the elder, to restrain the sale, alleged to be irregular, of some premises, part of the testator's estate, which were in mortgage to the Defendant *Mrs. Durnford*, and to set aside the mortgage altogether, or otherwise to redeem, the Defendant paying what should be found due from the testator's estate. A motion had been made in the suit for an injunction, and the Defendant submitted to an order being made. The cause now came to a hearing. The Defendant alleged that the mortgage was made to her by *J. Punter* the younger, the deceased executor of *J. Punter* the elder, as executor, to raise money for executorship purposes. The Plaintiff contended that *J. Punter* the younger made the mortgage for his own private debt, with notice actual or constructive to the mortgagee. *J. Punter* the younger died in September 1849. The Plaintiff *Miles* was his administrator, as well as executor of *Punter* the elder. The answer admitted the will of *Punter* the elder; his death, and probate of his will; the attempt to sell by the Defendant without giving three months' notice, in respect of which an injunction had been granted and submitted to; and the mortgage deed, by

which, among other things, it was provided that no sale should be made without three months' notice. It was also admitted that after advances had been made by the Defendant, and before the execution of the mortgage deed, an equitable mortgage had been made to the Defendant, in respect of which she had filed an ordinary equitable mortgagee's bill. The only other evidence given in support of the bill was a recital in the mortgage deed to the following effect, that "on the application and request of the said *J. Punter* the son, the said *Durnford* at divers times, between the months of October 1846 and February 1848, advanced and lent to the said *J. Punter* the son, several sums of money amounting together to the sum of 600*l.*, and that the sum of 350*l.* part of the said sum of 600*l.* was so advanced and lent to the said *J. Punter* the son, for the purpose of enabling him as such executor as aforesaid, to pay off or discharge a certain mortgage debt of 250*l.* and interest, to *Henry Smart*, charged upon the three houses in *Earl-street* aforesaid, and also to pay certain charges which the said *J. Punter* the son had incurred as such executor as aforesaid, and in and about the testator's estate, and that the said *E. Durnford* had taken other security for the remainder of the said sum of 600*l.*, and that there was then due from the said *J. Punter* the son, as such executor as aforesaid, to the said *E. Durnford*, in respect of the said sum of 350*l.* and the interest thereon, the sum of 370*l.*" The mortgage was only for 370*l.* There was a cross bill seeking to set up the deed, and embracing some other questions not material to be stated.

Mr. *Stuart* and Mr. *Nalder*, for the Plaintiff, said the bill asked that the mortgage might be declared void, or that the Plaintiff might redeem on payment of all that was due. The circumstance that the money had been

1852.
 MILES
 v.
 DURNFORD.

1852.
 MILES
 v.
 DURNFORD.

advanced long before the mortgage was sufficient to cast suspicion on the deed, and put the Defendant to prove that the money was advanced for executorship purposes: *M. Leod v. Drummond* (a). They referred also to *Keane v. Roberts* (b). The Plaintiff is entitled at the least to an inquiry whether any part of the money advanced was applied for executorship purposes.

Mr. Wilcock and Mr. Giffard, for the Defendant.

The bill ought to be dismissed at once. There is nothing to show that the money was not advanced for executorship purposes: and it must be presumed that the executor acted consistently with his duty: *Eland v. Eland* (c). The bill was, therefore, founded on no equity in reference to the deed; and if so, it was equally improper with reference to the injunction, which could only be obtained on the assumption that the case could be made out at the hearing. As to the alleged equity, the rule is not as stated, that where advances are made before any mortgage, the money is not to be taken to be advanced for executorship, but for private purposes. The true rule is that, where, from all the circumstances, an inference can be drawn that the money was advanced for the personal use of the executor, the security fails. Further, the bill cannot be sustained in its present form; for *Miles* the Plaintiff being the representative of *Punter* the mortgagor, cannot sue to set aside his testator's deed.

Mr. Bacon and Mr. Pole appeared in the cross cause, for a Defendant in that cause, who was not interested in the principal question.

(a) 14 Ves. 353. (b) 4 Madd. 332.
 (c) 4 Myl. & Cr. 420.

Mr. *Stuart*, in reply.

1852.
MILES
v.
DURNFORD.

On the question of the Plaintiff's incapacity to sue, he is entitled, as the executor of *Punter* the elder, to an inquiry into the true nature of the transaction; he asks it as executor of *Punter* the elder alone, leaving the liability of *Punter* the younger wholly untouched. This is not a case of misjoinder; there happens to be a union of two characters in one person; but the Court is bound to separate the two. The Plaintiff is bound, as the executor of *Punter* the elder, to sue to protect his testator's estate, and he cannot, by reason of his being also the administrator of *Punter* the younger, be prevented from protecting the estate that he represents. He does not sue in his double character, but in that of executor of *Punter* the elder exclusively. Besides, if he did sue in his double character, he is a trustee, and as such, though he might be liable personally, he is not precluded from suing even to set aside his own deed, for the protection and administration of the trust estate.

The VICE-CHANCELLOR :

The testator, *J. Punter*, died in May 1847; his son, *J. Punter* the younger, proved the will alone. At different periods between October 1846 and February 1848 *J. Punter* the younger applied to Mrs. *Durnford* the Defendant, to lend him several sums of money, representing that he wanted it for purposes connected with the estate; she lent him the sums. It was represented that the testator owed to a person named *Smart* 250*l.*, that *Smart* required payment, and 50*l.* was paid by *Punter* the younger in 1847, and that 200*l.* more was paid on the 2nd February 1848. When the advances were made by the Defendant to *Punter* there was no undertaking or

1852.

MILES

v.

DURNFORD.

agreement to give any security for the advance, and the effect at the time of making the advance was that they were made on the personal security of *Punter*, and gave no lien whatever on the testator's property, and any remedies for the Defendant would have been only against *Punter* personally. The loans to him, although stated to be for executorship purposes were not made to him in his character of executor, but were made to him personally, there being no agreement for giving any security on the testator's assets. Now, some months after the last of the advances, viz. on the 30th October 1848, *Punter* deposited certain deeds relating to the testator's leasehold property, with the Defendant, by way of security for the money advanced to him, and thus an equitable mortgage was created for the whole of the advances amounting to 600*l*. That equitable mortgage having been given, in February 1849 the Defendant attempted to enforce it by a bill in this Court to compel payment or sale. It was a common equitable mortgagee's bill, and in that suit the transaction was not treated otherwise than as the private transaction of *Punter*; that, however, was not necessary as between the Defendant and *Punter*. In a proceeding to obtain payment or sale, it was not necessary to make such a case, and therefore not much, or perhaps no, weight can be attributed to the debt having been treated in that suit as the personal debt of *Punter*. But shortly after, viz. on the 14th April 1849, *Punter* executed an actual mortgage deed to the Defendant for the purpose of securing not the 600*l*., but 370*l*., and the recital puts it in this shape:—[The Vice-Chancellor read the recital set out in p. 235], and the mortgage was for 370*l*. only. Now, it is clear that the equitable mortgage of 1848 having been for 600*l*. was a security given for what was an advance to him partly as executor and partly for money not so advanced, and the recitals in the

mortgage deed rest only on the statement of the parties that 350*l.* had been advanced to *Punter* in his character of executor. Now, the authority of an executor dealing with his testator's assets rests upon this principle. It is of importance to give to executors an uncontrolled power over the assets, and therefore the law gives him the right of dealing with the assets to raise money for the purposes of his testator's estate, and then the *onus* of showing that it was wanted for such purposes is not thrown upon the parties advancing the money. It is sufficient for him to show that he had no fair ground or reason to believe that the money was not wanted for executorship purposes. It is quite true that in such a case as that of the private banker of the executor to whom he owes a personal debt, if the banker accepts from him assets of the testator, knowing them to be so, then the banker is a party to the *devastavit*. But, although the principle of this Court is to allow an executor to deal with the assets of his testator, the principle does not apply when, having obtained money without security, he afterwards gives security on the testator's property for the antecedent loans. If there is a contract for a security at the time the advances are made, then a subsequent mortgage stands on the same footing as if it had been made at the time of the advance; but when the advance is made on the private security of the executor, his subsequently giving a security on the testator's property is not for the purpose of securing moneys advanced at the time, but is given as a security for amounts previously advanced on the credit of the testator's estate, with no obligation to give it, that is, without any legal necessity for giving it. Then, when a party being applied to, to advance money on the representation of an executor that it is for the pur-

1852.
 MILES
 v.
 DURNFORD.

1852.

MILES

v.

DURNFORD.

poses of the estate, and he advances the money on the mere personal security of the executor, and without taking any security or agreement for security, if he afterwards takes a security on the assets, the *onus* of proof is on the person who advances the money to show that the moneys advanced *were applied* to the purposes of the testator's estate. That rule is just and proper, and I am not aware of any case in which the contrary has been decided. If here there were no further difficulty, I should refer it to the Master to inquire whether any and what sums out of the 600*l.* were applied in the administration of the testator's estate. But I think that the Plaintiff who seeks to set aside the mortgage, being the representative of the party who executed it, cannot be heard to impeach that deed. It is true the bill is filed by *Miles*, wishing to repudiate for the purpose of this suit, another character which he fills, and he purports to file the bill only as representative of the testator. If that were the only character filled by him, he would be entitled to sustain it; but unfortunately after proving the will of *J. Punter* the elder, he took out letters of administration to *Punter* the younger. He stands therefore in the character of representative of *Punter* the younger, and he cannot be heard to say that, filling two characters, in one of which he could not sue, he has a right to be heard in that character in which, if he filled that only, he might sue. It is quite clear that if *Punter* the younger were living, and *Miles*, assuming him to be his co-executor, had joined in a bill, such a bill could not be sustained. It is clear also that, if *Punter* alone had filed a bill, it could not have been sustained. As the Plaintiff in this case has taken on himself the mixed character of a person who could not sue, and of representative of one who could,

I think he cannot be allowed to separate them and to sue in one of those characters only. For these reasons I am of opinion that I can make no decree as to impeaching the mortgage, and I must dismiss the bill so far as it seeks to impeach the deed, with costs.

1852.
MILES
v.
DURNFORD.

Between THOMAS JONES and FRANCES ESTHER his wife (since deceased),
Plaintiffs,

AND

R. MORRALL, MICHAEL W. BELLEW NUGENT and EMILY his wife, CYRUS MORRALL, EDWARD MORRALL, T. MORRALL, and H. MORRALL (out of the jurisdiction),
Defendants.

1852:
21st April and
5th May.
Practice.
Decree for wilful Default.
Executors.
Liability to pay Interest on Balances.

THIS was the hearing on further directions of a suit to administer the estate of *Frances Morrall*, of *Plas*

In an administration suit, the pleadings raised questions of

wilful default, and liability to pay interest on balances in hand against executors; but the decree taken at the original hearing neither contained any declaration against the executors, nor any inquiries as to wilful default, but was merely a decree for the common account of what had been received. Held, that the Court could not, on further directions, make any decree for wilful default; but that the question of interest on balances in hand was still open.

General principle on which the Court proceeds in making declarations in directing inquiries as to wilful default, and interest on balances in the hands of executors or trustees.

The balances remaining in the hands of the executors were very small. The testatrix died in 1823. The Plaintiff became a bankrupt in 1829; and in 1834, procured his assignees to re-assign all his interest to him. Neither he nor his assignees up to that time had made any application for payment. In 1835, the Plaintiff filed his bill for an account, and allowed it to be dismissed for want of prosecution in 1840; in 1842, he filed the present bill, and asked for interest on balances. Held, that, under these circumstances, he was not entitled to it.

1852.

JONES

v.

MORRALL.

Yallen, who died in December 1823, having, by a codicil to her will, made in January 1823, directed that the household goods, farm horses, cattle, farming implements, and other effects (except money and plate), being in and about the manor house of *Plas Yallen*, should remain there for the use of her son *William Morrall* during his life, and, after his decease, should be equally divided amongst all her children that should be then living; and after giving certain specific bequests, she gave the residue of her personal estate, not thereinbefore particularly disposed of, after payment of her debts and funeral and testamentary expenses, equally to be divided among all her children; and she appointed her sons *Charles Morrall*, and *Robert Morrall*, one of the Defendants, and her son-in-law *Thomas Jones*, the Plaintiff, executors of her said codicil. She left *W. Morrall* and seven other children living at her death. The codicil was proved by all the executors. The Plaintiff *Jones* became bankrupt in May 1829, and obtained his certificate in September 1829. In 1834, *Jones* and his assignee assigned to one *Edwards* all his interest in *Jones's* property, and by a subsequent deed *Edwards* declared himself a trustee for *Jones*. In 1835, *W. Morrall* died (the Defendant *R. Morrall* was his representative); and in the same year, the Plaintiff and his wife filed a bill for the administration of the testatrix's estate, which was dismissed for want of prosecution after answers had been duly put in, and other proceedings taken. In 1839, *C. Morrall* died, and the Defendants *Nugent* and wife were his representatives. In 1842, the present bill was filed; it alleged that, at the time of the death of the testatrix, household furniture, goods, horses, cattle, farming implements, and other effects, to a very considerable amount and value in the whole, being part of the personal estate of the testatrix, remained in and

about the mansion-house at *Plas Yallen*, and that the same were taken possession of by *W. Morrall* under the codicil. "That an inventory or valuation of the same goods and effects so remaining and so taken possession of by *W. Morrall*, was, at the decease of the testatrix, made out by and under the authority of *R. Morrall* and *C. Morrall*, as executors of the testatrix." It alleged the removal and misapplication of many of these things by *W. Morrall* during his life, with the sanction of *R. Morrall* or *C. Morrall*; that after his death, and down to the death of *C. Morrall*, *R.* and *C. Morrall* had allowed the remainder of the things to remain at *Plas Yallen* without taking any inventory thereof; "and that the same goods and effects were not, at the death of *W. Morrall*, nor had they ever been, converted into money or divided between the children of the testatrix as by the codicil was directed"; but that, on the death of *C. Morrall*, *R. Morrall* took possession of them, and still continues in possession of the same, which have now become greatly deteriorated in value."

1852.
 JONES
 v.
 MORRALL.

The bill then alleged that improper payments of rent of some of the leasehold estates of the testatrix, amounting to 760*l.* 17*s.* 11*d.*, had been permitted to be made by *R. Morrall* and *C. Morrall* to *W. Morrall*, and that the Plaintiff's wife never received more on account of her share of the rents, than 58*l.* 6*s.* 6*d.*

It then alleged that, at the death of *C. Morrall*, portions of the testatrix's personal estate remained in his hands, to be accounted for by him; and that both he and *R. Morrall* retained in their hands nearly the whole of what was due to the Plaintiff, *F. Jones*, in respect of her share of the residue of the testatrix's estate, and the

1852.

JONES

v.

MORRALL.

rents and produce of certain sales of timber. And it charged that *R. Morrall, and the estate of C. Morrall, ought to be charged with interest in respect thereof.*

It then contained the usual allegations of applications for an account, and refusals to account.

It charged that it was a breach of trust in *R. Morrall* and *C. Morrall* to have neglected to divide at the death of *W. Morrall*, the goods and effects at *Plas Yallen*. It prayed the usual administration accounts of the testatrix's personal estate, including the household goods, &c., directed to remain at the mansion-house, and the rents and profits of the leasehold estate; that the outstanding personal estate, if any, might be got in; *that it might be declared that the Defendant R. Morrall and C. Morrall, deceased, were guilty of breaches of trust, in permitting the rents and profits of the leasehold estate of the testatrix to be received and applied to his own use by W. Morrall, and also in neglecting to get in and divide the furniture remaining in the mansion-house at Plas Yallen at the death of W. Morrall, according to the directions and trusts contained in the testatrix's codicil; and that the Defendants R. Morrall, Nugent and his wife, and the estate of C. Morrall, might be decreed to make good the loss occasioned by the last-mentioned breach of trust; and might also be charged with, and with interest upon all such sums of money as had from time to time been remaining in the hands of, or due from them, or in the hands of, or due from the estate of C. Morrall, or which, but for the wilful default of the said Defendants respectively, or of the said C. Morrall, they might respectively have received.*

R. Morrall, by his answer, admitted that the Plaintiff

Jones had not acted as executor, except by proving the codicil; and that he and *C. Morrall* had alone acted in the administration of the estate.

1852.
JONES
v.
MORRALL.

The cause came on to be heard in July 1845, and by the decree then made, it was referred to the Master to take an account of the personal estate of the testatrix not specifically bequeathed by the codicil, including the household furniture, goods, horses, cattle, and farming implements, by the codicil directed to remain at *Plas Yallen* for the use of *W. Morrall* for his life, and of the rents and profits of the leasehold estate, and of the moneys produced by sales of timber, &c., come to the hands of Plaintiff since her bankruptcy (if any), or to the hands of *R. Morrall*, *C. Morrall*, and the Defendants *Nugent* and his wife, or of any of them, or to the hands of any other person or persons by their or either of their orders, or for their or any of their uses; and the Master was to inquire whether any, and, if any, what part of such personal estate remained outstanding or undisposed of. Then there was the usual inquiry as to debts, and to ascertain the clear residue of the testatrix's estate, *and liberty to state special circumstances relating to the matters aforesaid.*

The decree did not contain any direction to inquire what might have come to the hands of the Defendants but for their wilful default, nor any declaration or inquiry as to interest on balances in the Defendants' hands.

The Master found that there were seven children of the testatrix living at the death of *W. Morrall*, and he found that no part of the testatrix's personal estate was outstanding. The other material facts and parts of the

1852.
 JONES
 v.
 MORRALL.

pleadings, and of the Master's report, and the nature of the questions raised on further directions, are stated in the judgment.

Mr. Stuart and Mr. Haddan, for the Plaintiffs.

Mr. Malins and Mr. Piggott, for the principal Defendant, R. Morrall.

Mr. K. Parker, for Cyrus Morrall.

Mr. C. Hall, for Nugent and wife.

The VICE-CHANCELLOR :

May 5th.

This is a suit to administer the estate of a lady who died in the year 1823. The questions raised on the cause coming on, on further directions, are these :— First, it is contended by the Plaintiff, who represents the interest of a residuary legatee, that one of the Defendants, who is the surviving executor, and others, who represent the estate of a deceased executor, ought to be declared liable for the value of certain furniture and other effects remaining at the death of the testatrix in the mansion-house at *Plas Yallen*; Secondly, that those Defendants are liable to pay interest on balances in their hands from time to time, and for an account of the rents and profits of certain leasehold property; and Thirdly, that the Defendants ought to pay the costs of this suit; first, because of a refusal to account; and secondly, because they have disputed the Plaintiffs' claim. Now the facts, so far as they are material, are as follow :—The testatrix, *Mrs. Morrall*, in the lifetime of her husband, made, under a power so to do, a will, and appointed certain property, as to which bequest no question arises. Then her husband

1852.

JONES
v.
MORRALL.

died, and she made a codicil, by which she disposed of certain leasehold estates. She by this codicil directed, "all her household goods," &c. [The Vice-Chancellor referred to the direction for the disposition of the furniture and effects at *Plas Yallen*.]—That is the furniture and effects, as to which the first point is raised. Now, according to the terms of the will, *W. Morrall* the eldest son, was entitled to the benefit of the furniture and effects during his life, and after his death, the testatrix disposed of his residuary personal estate, "equally to be divided among all her children," and she appointed *Charles Morrall*, the Defendant *R. Morrall*, and the Plaintiff *Jones*, executors of her will. The Plaintiff *Jones* married a daughter of the testatrix. After the death of the testatrix, which took place in December 1823, the will and codicil were proved by the three executors, the Plaintiff proving as well as the others. In May 1829, *Jones* became a bankrupt. It must be observed that, at that time, he was entitled in right of his wife to one equal share of the testatrix's residuary estate. The testatrix left eight children, so that the Plaintiff, in right of his wife, was entitled to one-eighth of the residuary personal estate. And as to the furniture and other effects at the house called *Plas Yallen*, at the death of *W. Morrall*, if Mrs. *Jones* survived *W. Morrall*, she was entitled to one share of the furniture and effects, &c. Now, on the bankruptcy of the Plaintiff, his share of the residuary personal estate of course passed to his assignees. The Plaintiff *Jones* obtained his certificate in September 1829. From his bankruptcy till the time which I shall next mention, viz. till 1834, he had no interest in the testatrix's residuary personal estate. It appears that a person named *Chattock* was, in the lifetime of the testatrix, employed as bailiff to receive the rents of her leasehold estate, and he continued so to act after her

1852.
JONES
v.
MORRALL.

death. In December 1834, the share of Mrs. *Jones*, of the testatrix's residuary estate, was assigned by *Jones's* assignees, and by *Jones*, to one *Edwards*, who was in fact merely a trustee for *Jones* himself. In March 1835, *W. Morrall* died, and then the furniture and other effects in and about *Plas Yallen* became divisible amongst the children then living, and there were then seven living, so that the Plaintiff *Jones* was entitled to one-seventh of the furniture and effects, &c. On the death of *W. Morrall*, or shortly afterwards, that is, on the 7th April 1835, *Edwards*, to whom the Plaintiff's share was assigned, executed a deed declaring that he was a trustee for the Plaintiff, and on the 25th April *Jones* and his wife filed a bill against the other children, including the two who were the legal personal representatives of the testatrix, for an account of her personal estate, and of course *W. Morrall* being dead, that bill must have sought and did seek an account of the furniture and effects which were then divisible into seven parts, as well as of the general personal estate which was divisible among the eight children. That bill was not actively prosecuted, but lingered for some years, that is, from 1835 to 1840. In the meantime *C. Morrall*, one of the executors, died, and his daughter Mrs. *Gooch*, whom he appointed his executrix, proved his will, and then the suit was revived, and a bill of revivor and supplement was filed to seek an account of what *C. Morrall* had received. So matters stood till August 1840; answers were put in, and in the answers put in by *R. Morrall* and by *C. Morrall* an account of the personal estate came to their hands, in fact all the accounts asked for, had been furnished, but no decree was taken. In August 1840 the Defendants in that suit moved to dismiss for want of prosecution; and by an order, dated 3rd of August 1840, that bill, which had been pending for about five years and a quarter, was dismissed

with costs for want of prosecution. The Master taxed the costs, and on the 23rd December 1840, he certified the amount; and the general costs of the suit and certain other costs of proceedings in the suit were directed to be paid by the Plaintiffs. They were not and to this day are not paid. So matters remained till the 3rd November 1842, when *Jones* and his wife filed the present bill. A decree was made in July 1845. These are the facts so far as they are material.

1852.
JONES
v.
MORRALL.

The first point is this: the Plaintiffs say that *Robert Morrall*, the surviving executor, as well as the estate of *C. Morrall*, is responsible for the value of the furniture, &c. which the testatrix directed should remain at the house at *Plas Yallen*; that is, ought to be held liable to the Plaintiff for one-seventh of the value of that furniture, &c. Now this point as to the furniture is raised by the pleadings, and was before the Court on the hearing; the decree however not only declared nothing respecting it, but gave no directions for any inquiry as to it, on the result of which the Court could, on further directions, proceed. But what the decree did direct, was an account of the personal estate; that is, of what had been received by the executors, and it directed an account of the furniture and other things, no further than as to what part thereof had been received. The direction in the decree is:—[His Honor read the passage set out in p. 245.] There is no direction for any inquiry on which to charge them with what, without wilful default, they might have received. If it had been intended to raise that point, the Court ought at the hearing to have been induced to make some declaration, or to direct some inquiry, on the result of which on further directions it might act. The rule on this subject I conceive is this:—If the pleadings do not raise the point, it cannot

1852.
JONES
v.
MORRALL.

be raised either at the original hearing nor on further directions, but if the Plaintiff's pleadings do, as in this case, raise the point whether the Defendants are liable for wilful default, it is the duty of the Plaintiff if he can make a case for it, to get a declaration by the decree, or if he cannot make a sufficient case for an immediate decree, to get an inquiry of such a character, that on the result of it, the Court may on further directions make a declaration. But if the point is raised on the pleadings, and the Court by its decree passes it by, and neither makes any declaration, nor directs an inquiry, it must be taken that the Court did not mean to give any such relief; either that it was passed by by the Plaintiff, or that being urged by the Plaintiff, the Court did not think fit to give it. Now here the Court has not only made no declaration, and directed no special inquiry, but in directing the common account of the general personal estate has said, "take that account also as to the furniture," &c.; that is, an account of what has been received, not of what might have been received. But further, the decree directs an inquiry as to what is outstanding. Now, if any part of this furniture, &c. which might have been received has not been received, it would be outstanding estate. But the Master finds that there is no outstanding estate, and no exception has been taken to this finding, so that the question is concluded. But if it were now open, I think the Plaintiff could not have the relief now asked. *Jones* was himself one of the executors; he proved the will, and thereby took upon himself the execution of the trusts as much as his co-executors. And if a party thus under the obligation to perform a trust, does not choose to perform it, but leaves it to his co-executors, he cannot then say to his co-executors, because neither you nor I have realised this furniture and effects and divided them, I am entitled to call on you to

account, not for what you have actually received, but for what you and I might have received. I am of opinion that for all these reasons, there is no ground for making the Defendants liable for the value of the furniture and other effects which ought to have been realised and divided.

1852.
JONES
v.
MORRALL.

The next point is this, the Plaintiff says the Defendants ought to be held liable for interest on the balances from time to time in their hands. Now the Master's report says the balance of the personal estate is 767*l.* 18*s.* 5*d.*, of which the Plaintiff's share is 95*l.* 19*s.* 9*d.* *R. Morrall*, the surviving executor, is found liable for 88*l.* 14*s.*; and the Plaintiff's share of the rents of the testatrix's leasehold estate as against *C. Morrall*, the deceased executor, or his personal representative, is 158*l.* 5*s.* 9*d.*, out of which 154*l.* 3*s.* 9*d.* has been paid into Court. Except these small sums then, every part of the Plaintiff's share, as well of the general personal estate, as of the leasehold rents, has been duly paid to the Plaintiff.

Now, the Defendants, sought to be charged, insist that applying the rule to which I have referred, the Plaintiff cannot now claim interest on balances, because there was no declaration or inquiry as to balances at the hearing. But it appears to me that, correctly applying the rule, the Plaintiff has a right to raise the question. It is true, there was no declaration at the hearing, but there was that which is the first step towards such a declaration—there was a direction to take the common account of what had been received. The Court was not able, at the original hearing, to say whether there were any balances; but the direction to take an account of the personal estate, if properly answered by the Master,

1852.
JONES
v.
MORRALL.

ought to show what personal estate has been received from time to time, and the state of the receipts and of the payments should be shown upon the schedule ; and then, on that report with the schedule, the Court may hear it argued whether there are any balances, in respect of which the Court may either make an immediate declaration, or direct further inquiry. It is still competent therefore to the Plaintiff, under a decree directing a reference, the result of which affords the Court the materials on which to form an opinion, to raise the question. In this case, then, are the circumstances such that, if there are balances, there ought to be interest on those balances ? Now, I have said that, in 1829, viz. twenty years ago, the Plaintiff *Jones*, who now claims interest, was a bankrupt, and all his interest passed out of him to other persons ; and not only could he not then ask for payment, but no payment could properly have been offered to him. Now, it does not appear that he ever asked for payment ; but, in 1834, he procured his assignees to assign his share to a trustee for him ; in effect he bought it back in December 1834. Then he was again in a position to ask for accounts in respect of the personal estate of the testatrix ; and directly afterwards, that is, in April 1835, after the death of *W. Morrall*, he filed his bill, but he let it linger and be ultimately dismissed with costs for want of prosecution. He files a fresh bill in 1842 ; and the testatrix having died in 1823, he now claims to have interest on the balances in the hands of the executors. In order to give a claim for interest, there must be a clear case of improper retention of balances to a considerable or substantial amount ; but here the total balance retained, arising from the personal estate, amounts to less than 96*l.*, and the total share of the rents of the leasehold estate is a little more than 88*l.* As to the latter balance, in an early

stage of the proceedings after the testatrix's decease, it was erroneously considered that the leasehold was freehold. If it had been so, *W. Morrall* would have been entitled to the rents; however, he in fact received them, and the executors have been made liable to repay what was so received; and, under these circumstances, the Plaintiff claims interest on the balances. There is, in my opinion, no ground, under all these circumstances, for decreeing interest on the balances.

1852.
JONES
v.
MORRALL.

The remaining point is as to the costs, and it is said that the Plaintiff ought to have them on the ground of a refusal by the Defendants to account. Now, on that point, the circumstances to be attended to are these: on the 10th April 1835, three days after the execution of the deed by which *Edwards* became trustee of the Plaintiff's share for him, a solicitor for the Plaintiff wrote to *Robert* and *Charles Morrall*, the other executors, the two acting executors, as they have been called, as if for *Edwards* (who was a mere trustee), asking, on behalf of *Edwards*, for an account. Within fourteen days an answer was returned that an account should be rendered. Within fifteen days after the first application, the bill was filed. In the answers to that bill, the accounts were set out; and then that bill was dismissed. In 1842, two years after the dismissal, another solicitor for the Plaintiff called for the accounts, and proposed an arbitration. The answer was, "You have had the accounts; you have them on oath:" that at least was the substance of the answer. It was not suggested that the accounts were not fully given. This, then, does not amount to a refusal, the accounts having already been given. Then it is said that the Defendants have resisted, by their answer, the Plaintiff's claim. Now, the Defendants have, by their answer, suggested that the purchase

1852.

JONES

v.

MORRALL.

by *Jones* from his assignees was without a sufficient concurrence by the creditors. If this suggestion had led to any expense, I should so far have directed that to be borne by the Defendants; but it has caused no expense beyond, perhaps, the few lines stating it, adding to the length of the answer. Even that I would make the Defendants pay, if the expense to the Plaintiff of the inquiry into the amount, would not be more than he could have to receive; for I accede to the principle that, if a Defendant questions the title of the Plaintiff, and fails, and by that course puts the Plaintiff to any costs, the Defendant should pay so much of the costs as has been caused by the objection. But I do not act upon it, because here no perceptible increase of costs has been occasioned. The costs must go, therefore, according to the usual course in administration suits.

*Wiglesworth v. Harsden 10th R. 438.
Richard v. Robson 10th R. 657.*

LLOYD v. LLOYD.

1852:
March 4. 5. 18.

GEORGE LLOYD, by his will of the 13th October 1842, gave particular directions about his burial, and directed that his body should be interred in the vault in

Will.
Construction.
Condition
against Mar-
riage.
Charitable Use.

A testator, by his will, directed that his residuary personal and real estate should be sold, and *the proceeds vested in some government annuity* for the benefit of his wife, *L. Lloyd*, and of *A.*, for their joint lives, and at the death of either of them her share to go to the survivor; "and in case either *L. Lloyd* or *A.* should marry or to live in a state of adultery, then her share shall pass to the other, the same as if death had taken place; and should *L. Lloyd* and *A.* both marry, then their shares and interest shall pass to my nephew *H.* in case *L. Lloyd* and *A.* fails in fulfilling the conditions of this my will." And he directed *L. Lloyd* and *A.*, out of the annuities they received, to keep in good and sound repair a certain tomb and vault belonging to him, and to paint it, "and in default or failure they shall lose and forfeit their claims to the annuities, and any person hereafter that shall receive the annuities shall be bound to perform the same conditions."

Held, that, as between *L. Lloyd*, the widow, and *A.* the gift over to *A.* upon *L. Lloyd* marrying, was good; but the condition against *A.* marrying was void; that the gift over in the case of both marrying, was void; and that the condition annexed to the gift of the annuities to *L. Lloyd* and *A.* to keep his tomb in repair was good.

By a codicil, the testator gave the rent of a copyhold house for the benefit of his wife and *A.*, to be applied as in his will set forth, subject to all the conditions contained in his will, share and share alike; and after the death of his wife and *A.*, or in default of their, *L. Lloyd* and *A.*, not fulfilling the conditions contained in his will, he gave the said house upon trust for the minister and churchwardens of *St. Mary's, Chatham*, to apply the rents as follows: to take *5l. per annum* for themselves out of the rents, to keep the tomb in repair; and the residue and remainder of the rent to be applied for the benefit of his nephew, and, after the death of his nephew, the remainder of the rent to be applied for the benefit of the Church Missionary Society. At the original hearing, the devise to the ministers and churchwardens was declared void, and they were dismissed.

Held, that this decree was conclusive against the whole of the gift to the churchwardens, and that all the trusts failed; that the widow and *A.* took the legal estate in the rents during their joint lives, and the life of the survivor; with remainder to the customary heir of the testator.

1852.

LLOYD

v.

LLOYD.

St. Mary's church-yard at Chatham, and he then proceeded thus : " and that no person or persons whomsoever may be deposited in the said vault after my remains are there interred, save *Mary Martha Lockley*, if she continues a single woman and living a chaste life. And further I give and bequeath to *Mary Martha Lockley* my household furniture, glass, china, silver plate, jewellery, linen, &c. &c., for her own use and benefit, save and except hereinafter-mentioned bequests. And further, I direct and empower my executrix or executor to pay my funeral expenses and collect in all moneys, securities for money, and all other property of whatsoever description, of which I may die possessed now and hereafter, and that my said executrix or executor shall sell or cause to be sold to the best advantage, the whole of my personal and real estate, and shall invest the proceeds of such sale in some government annuity for the benefit of my wife *Lucy Lloyd* and *Mary Martha Lockley* ; and when the amount of the said government annuity is ascertained, then the said sum of money so raised by the way of an annuity, on the joint lives of my wife *Lucy Lloyd* and *Mary Martha Lockley*, is to be equally divided share and share alike, between *Lucy Lloyd* and *Mary Martha Lockley* ; and at the death of either of the above-named *Lucy Lloyd* or *Mary Martha Lockley*, her share at her death shall pass to the survivor of the two above-named *Lucy Lloyd* and *Mary Martha Lockley* on the day of their decease ; and in case either *Lucy Lloyd* or *Mary Martha Lockley* should marry, or to live in a state of adultery, then her share shall pass to the other, the same as if death had taken place ; and should *Lucy Lloyd* and *Mary Martha Lockley* both marry, then their shares and interest shall pass to my nephew *Samuel Hayes*, of *Woolwich, Kent*, in case *Lucy Lloyd* and *Mary Martha Lockley* fails in fulfilling the conditions of this my will. And further, I desire that my wife *Lucy*

Lloyd and Mary Martha Lockley shall, out of the annuity they receive, *keep in good sound repair the tomb and vault in Chatham church-yard, that belongs to me, and cause to be painted the said tomb and vault every four years, or, if required, more frequent, and in default or failure they shall lose and forfeit their claim to the annuity, and any person hereafter that shall receive the annuity, shall be bound to perform the same conditions."*

1852.

LLOYD

v.

LLOYD.

The testator made a first codicil, by which he gave to *J. W. Pyle* a certain house at *Barnes-terrace*, in the county of *Surrey*, in the occupation of *J. W. Pyle*, if he chose to comply with certain conditions. He made a second codicil, referring to the property mentioned in the first codicil, the material parts of which were as follow: "I further desire that my house at *Barnes, Barnes-terrace*, in the county of *Surrey*, now in the occupation of *Mr. Pyle*, shall not be sold, but let at a yearly rental or on lease to the best advantage, for the benefit of my wife, *Lucy Lloyd*, and *Mary Martha Lockley*, and the proceeds of the rent applied as my will sets forth, subject to all the conditions contained in my will, the same as if the house had been sold, share and share alike; and after the death of my wife, *Lucy Lloyd*, and *Mary Martha Lockley* (or in case *Mr. James Wilhelm Pyle*, of *Barnes*, refuses to accept of my offer to him in a codicil dated the 12th day of October 1844 as respects the said house at *Barnes*), or in default of them, *Lucy Lloyd* and *Mary Martha Lockley*, not fulfilling the conditions contained in my will, I give and bequeath upon trust the said house at *Barnes*, in the county of *Surrey*, to the minister and churchwardens of *St. Mary's Church, Chatham*, in the county of *Kent*,

1852.

LLOYD

v.

LLOYD.

for the said minister and churchwardens, to apply the proceeds of the rent of the said house at *Barnes* as follows: first, to take for themselves 5*l.* every year for their expenses out of the rent or proceeds of the said house at *Barnes*; and further to keep in good sound repair the vault and tomb, and cause the said tomb to be painted every third year that belongs to me in *Chatham* church-yard; then the residue and remainder of the said rent to be applied for the benefit of my nephew, *Samuel Hayes*, of *Woolwich*, in the county of *Kent*, and after the death of the above *Samuel Hayes*, of *Woolwich*, then the residue and remainder of the said rent is to be applied for the benefit of the Church Missionary Society attached to *St. Mary's* Church, *Chatham, Kent*."

A bill was filed for the administration of *G. Lloyd's* estate by his widow, *Lucy Lloyd*, against *A. M. Lloyd*, the customary heir-at-law of the testator, *Mary Martha Lockley*, *S. H. Hayes*, the nephew of the testator, *J. W. Pyle*, to whom the option was given by the first codicil, and the minister and churchwardens of *St. Mary's, Chatham, Kent*. These last-named Defendants were dismissed at the original hearing, on the ground that the devise to them was void. The cause now came on for further directions upon the questions arising on the construction of *G. Lloyd's* will.

Mr. *Torriano*, for the Plaintiff.

The first question for the discussion of the Court is, whether the Plaintiff, *L. Lloyd*, and the Defendant, *M. M. Lockley*, take the interests given to them in the annuity, discharged from the conditions contained in the

will. The condition in restriction of marriage is void; and *L. Lloyd* and *M. M. Lockley* take the annuity discharged from it. It is a general condition subsequent, and applies to both the annuitants. Therefore, whether it is good or not as to the widow, being clearly void as to the unmarried woman, it is wholly void, because it is indivisible; and a general restraint on marriage by a condition subsequent, as against a single woman, is clearly void: *Rishton v. Cobb* (a), *Morley v. Rennoldson* (b), *Grace v. Webb* (c), *Webb v. Grace* (d). The next question is, as to the rents of the copyhold house at *Barnes*. The question as to that is, whether, under the second codicil, the condition contained in the will against the marriage of *L. Lloyd* and *M. M. Lockley* takes effect. As to these rents, the two female legatees take life estates to them and the survivor of them, discharged of the condition against marriage; and the only remaining question upon this part of the will is, whether the reversion in fee goes to the copyhold heir or to the devisee over. The third question is, whether *L. Lloyd* and *M. M. Lockley* are bound to repair the testator's tomb under the directions contained in the latter part of his will. In another part of his will he has directed that nobody should be buried in his tomb other than himself, except *M. M. Lockley*, and then only if she remained single. Whether, therefore, the direction to keep up his tomb if he only were to be buried in it, would be good or not; yet, as the tomb is also to be the tomb of a stranger, the direction to keep it up is a charitable use, being partly for the maintenance of the

1852.

LLOYD
v.
LLOYD.

(a) 9 Sim. 615, and 5 Myl.
& Cr. 145.

(c) 15 Sim. 384.
(d) 2 Phil. 701.

(b) 2 Hare, 570.

1852.

LLOYD

v.

LLOYD.

tomb of a stranger; therefore it is void: 1 Jarm. on Wills, 193; *Mellick v. President of the Asylum* (e).

Mr. *Haldane*, for *M. M. Lockley*, argued in the same interest as the Plaintiff.

Mr. *Malins* and Mr. *Collins*, for *A. M. Lloyd*, the customary heir-at-law.

The condition annexed to the gift of the annuity is in restraint of marriage or adultery. As to the condition against adultery, it is clearly good, being in restraint of *malum in se*. As to the condition against marriage, *Webb v. Grace* in 2 Phil. is an authority that a man may determine a gift to his widow, or to any other woman on her marrying. In this case the clause is not strictly a condition in restraint of marriage. It is merely a form of gift to a woman, terminating it on her marriage, implying an expectation in the mind of the testator that the woman is to be provided for by her husband. *Webb v. Grace* is opposed to *Morley v. Renoldson*. It is true that *Webb v. Grace* was a case of covenant, but the covenant was voluntary, the claim was merely to the bounty of the covenantor, as in a will. Even if the condition is not altogether good, at any rate it is good as regards *L. Lloyd*, the widow: *Lusford v. Cheek* (f). With reference to the residue of the rents referred to in the second codicil, the gift by that codicil to the minister and churchwardens of *St. Mary's, Chatham*, is upon trust for purposes which, by the original decree in the cause, have been declared void; and the gift of the residue, after fulfilling such purposes, to the testator's nephew, *S. Hayes*, passes

(e) 1 Jac. 180.

(f) 3 Lev. 125.

nothing to him, because such residue cannot be ascertained. The gift therefore fails, and the residue of the rents goes to the customary heir-at-law: *Chapman v. Brown* (g), *Cherry v. Mott* (h).

1852.
LLOYD
v.
LLOYD.

Mr. *Begbie*, for the nephew, *S. Hayes*.

The condition against the marriage of *L. Lloyd* and *M. M. Lockley* is good. In the case cited of *Morley v. Rennoldson*, by the will property was given to the testator's daughter, recognising her capacity for marriage, and in the codicil the testator referred expressly to her incapacity for marriage; but the codicil adopted the will; therefore it would have been inconsistent with the will to allow the restraint on marriage imposed by the codicil. But in this case the effect of the words used is to create a limitation till marriage; not a condition subsequent, but a conditional limitation; and therefore it is good. As to the condition for repairing the testator's tomb, *Jarman on Wills* and *Mellick v. President of the Asylum* have been cited, to show that there is a distinction when the tomb is that of a stranger, and when it is the testator's. Here the tomb is the testator's only, and not *M. M. Lockley's*. For the testator does not direct that she shall be buried there, but only that no other person shall. The direction to keep up the tomb is clearly not a perpetuity.

[Upon the question whether the gift of the residue of the rents of the house at *Barnes*, in favour of the testator's nephew, could take effect, the Vice-Chancellor intimated that a difficulty arose whether the original decree, which declared the gift to or in favour of the trus-

(g) 6 Ves. 404.

(h) 1 Myl. & Cr. 123.

1852.

LLOYD

v.

LLOYD.

tees of the fund for repairing the tomb void, and dismissed them from the suit, did not decide that all interest in them ceased.]

Mr. *Begbie*.

The devise, so far as it is void, is not so by force of decree, but was so before it. The Court dismissed the trustees, but left the gift subsisting as to the beneficial interests given. This equitable gift will not fail because the legal estate fails: *King v. Denison* (i), *Hill v. Bishop of London* (k). The gift of the rents to *S. Hayes* gives him an estate in fee; the remainder over after his death is void, and he takes an absolute fee: *Mitford v. Reynolds* (l).

Mr. *Torriano*, in reply.

18th March.

The VICE-CHANCELLOR :

This case turns upon the construction of the will of *G. Lloyd*. It appears that the testator was a married man and left a widow, but no child, and he left also a person surviving him named *M. M. Lockley*, a spinster, who was a friend, or at any rate a person for whom he desired to make a provision, but she was not a relation. He left also a nephew, *S. Hayes*. The principal objects of his bounty were his widow and *M. M. Lockley*, and in some degree his nephew *S. Hayes*; he appointed a person named *Brown* and *M. M. Lockley* his executor and executrix. Then he gave directions as to his funeral, and then he adds these words, which may not be immaterial in assisting the construction:—"That no person

(i) 1 Ves. & B. 260.

(l) 1 Phil. 185.

(k) 1 Atk. 618.

or persons whomsoever may be deposited in the said vault after my remains are therein interred save *M. M. Lockley*, if she continues a single woman and living a chaste life," thereby indicating one object of the testator's wishes to be that *M. M. Lockley* should continue a single woman. Then he gives to *M. M. Lockley* certain chattels for her own use, and then he goes on:—"I further direct and empower my executors," &c. [His Honor read the clause of the will directing the purchase of a government annuity, and the disposition of it, and then proceeded:] If the will stopped here, there would be no difficulty. The testator intended his executors to convert his real and personal estate into money, and to invest the proceeds in a government annuity for the joint lives of *M. M. Lockley* and his widow, and the life of the survivor, not confining the annuity to the period of their joint lives, but giving it, after the death of either, to the survivor. Then he goes on, "And in case either *L. Lloyd* or *M. M. Lockley* should marry," &c.; the intention of the testator was, that if either his widow or *M. M. Lockley* should marry, the whole annuity should go to the survivor. Now with regard to that which is an apparent condition subsequent, annexed to the estate of a tenant for life, by the rule of law it is void as to *M. M. Lockley*, but according to the authorities such a condition is not void as to the wife, the law recognising in a husband such an interest in his wife's widowhood as to make it lawful for him to restrain her from making a second marriage, by imposing a condition that on such marriage any provision he may have made for her shall cease. And with regard either to his wife or to any other woman, a testator may make a gift so long as she shall remain single; but if he first gives a life estate to a single woman, a stranger to him, and then annexes a condition that in case she marries at all, it shall go

1852.

LLOYD

v.

LLOYD.

1852.

LLOYD

v.

LLOYD.

over, that, being in general restraint of marriage, is not a good condition. The effect, therefore, of the clause referred to is, that if his wife shall marry, her share shall go over to *M. M. Lockley*; but *M. M. Lockley* will lose nothing by marrying, she will still continue entitled. Then follows another condition: "And should *L. Lloyd* and *M. M. Lockley* both marry," &c. Part of this is intelligible, but on the whole it is not easy to say what is meant by it. So far as it shows an intention to give the provision over in the event of both marrying, that is void as to *M. M. Lockley*, and the gift over in the event of both marrying is therefore void. But the next condition is, "in case *L. Lloyd* and *M. M. Lockley* fail in fulfilling the conditions of this my will." It is difficult to say whether the testator intended to say if *L. Lloyd* and *M. M. Lockley* should marry or fail, in the disjunctive, or whether he meant if both should, in the conjunctive, marry and fail. My impression is that he meant that if both should marry, the gift over was to take effect, and that is void. He then adds another condition to be fulfilled by his widow and *M. M. Lockley*. [His Honor read the directions for repairing the tomb.] I am satisfied that a direction simply for keeping a tomb in repair is not a charitable use, and is not of itself illegal. It may be illegal to vest property in trustees in perpetuity for such a purpose. But the direction that the widow and *M. M. Lockley* shall, out of their life-interests, keep the tomb in repair, &c. is quite lawful, and they are under an obligation out of their annuities to do so according to the directions of the will. [The Vice-Chancellor then referred to the first codicil, by which an option was given to Mr. *Pyle* to purchase the copyhold house at *Barnes*, the questions arising upon which it became immaterial to consider, *Pyle* having refused to purchase, and proceeded:] The testator by the second

codicil to his will, refers to his copyhold house mentioned in the first codicil, showing by that reference that his mind was directed to the fact that he had by the first codicil directed a sale. If therefore *Pyle* did not accept the house, it was, by the second codicil, to be let, and the rent paid to his widow and to *M. M. Lockley* in the same manner as the annuity, that is, to them for their joint lives, and for the life of the survivor. There is no disposition of the *corpus* till after the death of the survivor, and then the gift is as follows:—[His Honor read the clause giving the rents of the copyhold house over after the death of *L. Lloyd* and *M. M. Lockley*.] Now, stopping here, the language is inartificial, and if read literally, does not express the meaning which is to be gathered from the whole scope of the codicil. What the testator meant was, if Mr. *Pyle* does not accept the offer, the house is to be let, the rent to be paid to the widow and *M. M. Lockley* for their joint lives and the life of the survivor, then to the minister and churchwardens. And also to the churchwardens, &c. if the widow and *M. M. Lockley* fail in performing the conditions. Now as to the condition in restriction of marriage as against *M. M. Lockley*, that is void; but the other condition as to maintaining the tomb is valid, and the limitation over in the event of the widow and *M. M. Lockley* not fulfilling that condition is good, if the devise over itself is valid. But the devise to the minister and churchwardens is upon trust to take 5*l.* yearly for themselves, &c. Now the gift of the 5*l.* a year would not of course be illegal, if the duty created by the trust were valid; but the next trust is to keep the tomb in repair, &c. Now this being a devise of the inheritance on trust to repair, &c., the trust is in fact a perpetuity; and I suppose it was on that ground that the Court at the original hearing declared the devise to the minister and churchwardens wholly

1852.

LLOYD
v.
LLOYD.

1852.

LLOYD

v.

LLOYD.

void and dismissed them from the suit. Whether that decree is right or not (and I think it was) I must assume it to be so, and am bound by it. The effect of it is, that everything that is contained in the gift, and every trust engrafted on it, is void. The devise *to*, as well as *for the benefit* of the minister and churchwardens, is void by the decree. It is therefore unnecessary to consider what is to be done with the surplus rents after providing for the repairs of the tomb. The gift over to the Church Missionary Society is clearly void. The effect of the whole is, that the testator's property after payment of the costs must be invested in the purchase of a government annuity for the joint lives of the widow and of *M. M. Lockley*, and for the life of the survivor. There must be a direction to pay the income to them during their joint lives, they undertaking to perform the condition as to repairing, painting, &c. the tomb, with liberty to apply on the death of either of the two annuitants, or in any other event. While both remain single it is not material (although I have expressed my opinion) to make any declaration what may be the result of the widow marrying again, or not performing the condition about repairing the tomb. It must be declared as to the copyhold house, that the widow and *M. M. Lockley* are entitled to it during their joint lives and the life of the survivor, they taking the legal estate by the devise during their lives and the life of the survivor; and that after the death of the survivor, it goes to the customary heir.

WEBB v. WOOLS.

THIS was a suit for the administration of the will of *Richard Webb*, who by his will appointed his widow and *Edward Wools*, his executrix and executor; the Plaintiff was the widow; the Defendants were *Wools* the executor, and the children of the testator. On the cause coming on for further directions, the principal question turned on the construction of the will, the material parts of which are stated in the judgment.

Mr. *Shapter*, for the Plaintiff.

Mr. *Murray*, for the children.

Mr. *Beavan*, for the executor *Wools*.

The following cases were cited:—*Crockett v. Crockett* (a), *Raikes v. Wood* (b), *Woods v. Woods* (c).

The VICE-CHANCELLOR :

This is a case of a gift to a parent with words in the will which raise a question whether there is a trust for the children or family of the parent. In the present case the words of the will are short; they are as follow: "This is the last will and testament of me, *Richard Webb*, of *Langley March*, *Bucks*, miller; all my property of whatsoever description, whether in possession,

that she shall dispose of the same to and for the joint benefit of herself and my children."

The Court gave an opinion that there was no trust created for the children; but, declining to make a positive declaration to that effect, held, that it would be right to order the residuary personal estate to be transferred and paid to the widow, and decreed accordingly.

1852:
27th March and
26th April.

Will.
Construction.
Trust.
Precatory
Words.

Testator by his will gave "all my property of whatever description, whether in possession, reversion, remainder, or expectancy, or which I may be possessed of at the time of my death, and I give and bequeath the same and every part thereof unto my dear wife *Jane*, her executors, administrators, and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her

(a) 1 Hare, 452; 5 Hare, 326, and 2 Phil. 553.

(b) 1 Hare, 445.

(c) 1 Myl. & Cr. 401.

1852.

WEBB

v.

WOOLS.

reversion, remainder, or expectancy, or which I may be possessed of at the time of my death, I give and bequeath the same and every part thereof unto my dear wife *Jane*, her executors, administrators, and assigns, to and for her and their own use and benefit."

If the will stopped there, there could be no question: the will expressly declares that the parties to benefit are the wife, her executors, administrators, and assigns. There is a gift to her of the whole legal interest, and of the whole beneficial interest; if she was alive at the time when the fund was realised, it would go to her; if dead before it was realised, it would go to her executors and administrators as part of her assets; and if she had made an assignment, it would go to her assigns; and if that be so, then if the following words are to be read as importing any benefit to other parties, they are clearly contradictory to the language which I have just read. The words immediately following in the will are these: "Upon the fullest trust and confidence reposed in her *that she shall dispose of the same to and for the joint benefit of herself and my children*, and I hereby appoint my said wife, and my friend *Edward Wools*, of *Uxbridge*, executrix and executor of this my last will and testament, hereby revoking all previous testamentary papers at any time heretofore made by me."

The question is, whether the last clause, "in the fullest trust and confidence," &c., raises a trust for the benefit of the widow and the testator's children, contradicting the express gift in the previous part of the will to the wife for her own use and benefit. Now there is one rule of construction almost elementary which appears to me to apply to this case; viz. that if there are two clauses, or sentences, or two branches of one sentence in a will, capable of two different constructions, accord-

ing to one of which the two clauses would be contradictory, but according to the other of which the two clauses would be in accordance with each other, the rule is to adopt that construction which reconciles the two, instead of that which makes them contradictory. Now, here there are, not two sentences, but two parts of the same sentence; and if I put on the latter a construction which will have the effect of creating a trust for the benefit of the children, I shall make the two branches of the sentence contradictory; is there then any construction which can be put on the last branch which will prevent a contradiction? I think there is, and that I may fairly put this construction on the latter branch of the clause, that it is not introduced for the purpose of creating any trust for the benefit of the wife and children, that is, a trust which the children could enforce, but merely for the purpose of declaring that, giving all his property to his wife for her own use and benefit, making her absolute mistress of it by the first branch of the clause, he means by the latter branch of it, to indicate that he reposes in his wife full confidence that she will dispose of it for the benefit of herself and children, but without intending to impose on her any obligation which this Court could enforce. In looking over the cases to which I have been referred I find none in all respects the same as this.* The nearest or

1852.
 WEBB
 v.
 WOOLLS.

* The following list of cases, in addition to those already referred to, had been handed up to the Court:—*Hamley v. Gilbert*, Jacob, 354; *Hammond v. Neamer*, 1 Swanst. 35; *Foley v. Parry*, 2 Myl. & K. 138; *Brand v. Bevan*, 1 Russ. 511; *Cooper v. Thornton*, 3 Bro. C. C. 96, 186; *Collier v. Collier*, 3 Ves. 33; *Andrews v. Partington*, 2 Cox, 223; *Curtis v. Ripper*, 5 Madd. 434; *Robinson v. Tickell*, 8 Ves. 142; *Conolly v. Butcher*, 8 Beav. 347; *Costobadie v. Costobadie*, 6 Hare, 410; *Cafe v. Bent*, 3 Hare, 245; *Leach v. Leach*, 13 Sim. 304; *Bowden v. Laing*, 14 Sim. 113; *Wetherell v. Wilson*, 1 Keen, 80.

1852.

WEBB

v.

WOOLS.

one of the nearest is, *Crockett v. Crockett* (d) ; in that case the language of the will was this : " My last desire is, that all and every part of my property shall be at the disposal of my most true and lawful wife, *Caroline Crockett*, for herself and her children, in the event of any unforeseen accident happening to myself." The difference between that case and the present case is, that there is not in that case in the first instance a gift to the wife, her executors, administrators, and assigns, for her and their own use, but merely a direction that the property shall be at the disposal of the wife for herself and her children. Vice-Chancellor *Wigram* held in that case, that the wife and children took as joint tenants. When the case came on upon appeal, Lord *Cottenham* reversed the declaration made by the Vice-Chancellor, and the direction to pay a share to one of the children ; but his lordship declined to declare the rights of the parties. He said, " the wife had a personal interest in the fund ; and as between herself and her children she was either a trustee with a large discretion as to the application of the fund, or she had a power in favour of the children, subject to a life estate in herself ;" and there he left it, and probably on account of the great difficulty of saying which of the two was the right construction. Very little instruction is to be obtained from that case ; but if it had been fully decided, it does not bear very strongly upon the present case. Here the will sets out by declaring, and that, in the same sentence which contains the declaration of confidence, that the gift to the wife is for her own use and benefit. There was no such clause in *Crockett v. Crockett*. Then there is another case of *Woods v. Woods* (e) which has a little bearing on the

(d) 1 Hare, 451 ; 5 Hare, 326 ; and 2 Phil. 553.

(e) 1 Myl. & Cr. 401.

present case, but not enough to make it material to go through it. Then there is the case of *Raikes v. Ward* (f), which is more like *Crockett v. Crockett*. There the will was—"I give to my dear wife, *Marianne*, all my moneys, securities for money, goods, chattels, and personal estate whatever, to the intent that she may dispose of the same for the benefit of herself and our children, in such manner as she may deem most advantageous." The difference between that case and the present is this, that there the gift was in form, so far from being a gift for the wife's own benefit, a gift to her that she might dispose of it for the benefit of herself and the children. In that case the *Vice-chancellor* gave his opinion that there was a trust, but that the Court would not deprive the widow of the exercise of the discretion reposed in her. In that case there was an express direction that the wife was to have a discretion, and though there was no decree, the *Vice-chancellor* expressed an opinion, and, as I think, a correct one, that this was a trust with a discretion in the wife with which, if honestly exercised, the Court could not interfere. *Raikes v. Ward*, and *Crockett v. Crockett* are the two cases which most nearly approach the present case, but neither of them governs it. And I must in this case declare that the wife is entitled to have the whole residue of the personal estate transferred and paid to her for her own use and benefit. In making this declaration, I think I am putting the right construction on the will; and there are two cases which, though not governing this, may tend to show that at any rate the declaration that I make is right. I refer to *Cooper v. Thornton* (g), and *Robinson v. Tickell* (h). In *Cooper v. Thornton* the bequest was "to *Thomas Cooper*, 100*l.*, to be equally divided between himself and his family," and Lord *Alvanley* decided that the 100*l.* was rightly paid to *Thomas Cooper*; and, on appeal, Lord *Thurlow* (f) 1 Hare, 445. (g) 3 Br. C. C. 96, 186. (h) 8 Ves. 142.

1852.

WEBB

v.

WOOLS.

1852.

WEBB

v.

WOOLLS.

affirmed the decision. *Robinson v. Tickell* was decided on the authority of the preceding case. [His Honor referred to the language of the will, and continued :—] This was in effect a gift of 2000*l.* stock to Mrs. *Robinson* for her and her children ; and on the authority of *Cooper v. Thornton*, Sir *W. Grant* directed the 2000*l.* to be paid to her, leaving her to execute the trust. In these cases there was no declaration that there was no trust ; but the declaration was that, if there was a trust, the money was rightly paid to the legatee, the parent, leaving the parent to deal with it according to the children's rights, if any.

Those cases do not govern this, but they show that even if there is a trust here for the children, still I might properly direct the property to be transferred to the parent. I must confess that were it not for those cases, if there were a trust in this case, I do not see the propriety of handing over the property to be dealt with in such a way that the children might never receive it. I should have thought that the children would be entitled to have it secured ; and in *Woods v. Woods* (i), which is a case not altogether unlike this, Lord *Cottenham* held that the children might sustain a bill against the widow and her executor. [His Honor referred to the language of the will and proceeded :—] In effect there was a declaration that if there was a sale, then, after paying his debts, &c., any overplus was to be for his wife for her support and that of her family. One would think that, having regard to the case of *Cooper v. Thornton*, and *Robinson v. Tickell*, this would have been a case for directing payment to the mother ; and accordingly, on a bill being filed by the children, a demurrer was put in and allowed by the late *Vice-Chancellor of England*, but on appeal Lord *Cottenham* overruled it.

If in this case I were of opinion that there is a trust,

(i) 1 Myl. & Cr. 401.

I do not see how it would be on principle right to part with the fund ; but, being of opinion that the testator's expressions of trust and confidence in his wife did not create a trust as against the wife ; but that, being in the same sentence in which he makes an absolute gift to her, they are stated only by way of expressing his reasons for the gift—for these reasons, and finding no case governing the present case, I am of opinion that there is no trust. But without actually declaring that there is no trust, I shall declare the widow entitled to have the residuary personal estate transferred and paid to her for her own use and benefit. And the decree will be accordingly (k).

(k) See *Ware v. Mallard*, 16 Jur. 492.

1852.

WEBB

v.

WOOLS.

GRAY v. GRAY.

THE question in this case was, whether a particular sum of stock added by a trustee to another sum standing in her name on admitted trusts, was impressed with the same trusts. *Mary Margaret Cave*, the sister of the Plaintiff, being, at the time of her decease, possessed

1852:
April 21st.
May 8th.

Trust.

*What Acts
constitute a
binding Trust.*

A testatrix gave to *A.* and *B.*, in trust for the benefit of *C.*, her sister, a sum of 2000*l.* 3*l.* per Cent. Consols. She afterwards expressed to *B.*, whom she also appointed her executrix, an intention that *C.* should have a further sum of 2000*l.* Consols, but she did not alter her will. *A.* died in her lifetime ; after her death *B.*, the surviving trustee and executrix, sold 2000*l.* Consols, and invested the produce in her name in the 3*l.* per Cent. Reduced, and shortly afterwards she invested a further sum of 2000*l.* 3*l.* per Cent. Reduced in her name ; she was proved to have declared frequently her intention of carrying out the testatrix's intention. Held, that the second sum of stock was duly impressed with a trust in favour of *C.*

A testatrix gave to *A.* and *B.*, in trust for the be-

1852.

GRAY

v.

GRAY.

of large personal estate, consisting, among other things, of several thousand pounds invested in the 3*l*. per Cent. Consolidated Bank Annuities, made her last will, dated the 21st of November 1843, and thereby, after bequeathing to her brother, *David Cave*, the sum of 2000*l*. 3*l*. per Cent. Consolidated Bank Annuities, part of a larger sum then standing in her name, she gave and bequeathed the sum of 2000*l*. 3*l*. per Cent. Consolidated Bank Annuities, to her brother *David Cave* and her sister *Cecilia Cave*, upon trust, during the joint and natural lives of her sister, the Plaintiff, and of *George Gray*, her husband, to pay the interest, dividends, and annual or other produce of the said sum of 2000*l*. stock, as the Plaintiff should appoint, but not by way of anticipation ; in default of appointment, for the Plaintiff, for her separate use, in the usual manner ; and after the death of *George Gray*, in case the Plaintiff should survive him, upon trust to transfer the 2000*l*. stock to the Plaintiff absolutely, to and for her own proper use and benefit, or otherwise, as she should direct or appoint ; but in case the Plaintiff should die in the lifetime of *George Gray*, her husband, then the same 2000*l*. was, immediately after the decease of the Plaintiff in the lifetime of *George Gray*, to sink into, and become part and parcel of, and be enjoyed with, the rest and residue of her estate and effects thereafter given and bequeathed to her said sister *Cecilia Cave* ; and the 2000*l*. stock was, on the decease of the Plaintiff in the lifetime of *George Gray*, to be paid and transferred according to the events aforesaid, and the residuary bequest thereafter contained ; and as to the rest, residue, and remainder of the funded property of the said testatrix, and all other her property, estate and effects whatsoever, wheresoever and of whatever kind or quality the same might be, and not thereby otherwise given, bequeathed or disposed of, but in-

cluding the said last-mentioned sum of 2000*l.* 3*l.* per Cent. Consolidated Bank Annuities, and accrued interest thereon, in the event of the same becoming part of such residue upon the contingency above mentioned of the Plaintiff dying in the lifetime of her said husband, the testatrix gave and bequeathed the same rest, residue and remainder, and every part and parcel thereof respectively, unto and to the use of her said sister *Cecilia Cave*, to hold to her and her executors, administrators and assigns, absolutely, for ever for her and their use and benefit.

1852.
 GRAY
 v.
 GRAY.

The testatrix died on the 12th June 1845; the will was proved by *Cecilia Cave* alone on the 27th June 1845.

The bill was filed by *Harriet Gray*, and it stated that for some months previous to the decease of the testatrix, she was in a very weak and infirm state of health; and had not sufficient strength, except at great personal inconvenience, to attend to any alteration in her will; but that, in consequence of the death of *David Cave*, her brother, in her lifetime, whereby the bequest to him of 2000*l.* 3*l.* per Cent. Consolidated Bank Annuities became lapsed, she intimated to her sister, *Cecilia Cave*, a wish to alter her will, and to leave the 2000*l.* stock so bequeathed to her brother, to her sister the Plaintiff, in addition to the 2000*l.* stock already bequeathed to her by her will; that the health of the testatrix gradually declined until her decease, and that she died without ever having been able to carry her before-mentioned intentions into effect. The Plaintiff stated that very shortly previous to her sister's decease, she exacted from *Cecilia Cave* a promise which was given to her by *Cecilia Cave*, that the 2000*l.* bequeathed in her will to her said brother *David* should be

1852.

GRAY

v.

GRAY.

given to the Plaintiff by her, *Cecilia Cave*, in addition to the 2000*l.* already bequeathed to her, making in all the sum of 4000*l.* 3*l.* per Cent. Consolidated Bank Annuities. It then went on to state the material circumstances on which the equity of the bill rested, and which were proved by the following evidence, given by *W. Woodward*, a nephew of the testatrix. He deposed as follows: "*Harriet Gray*, the Plaintiff, and *Cecilia Cave*, one of the Defendants in this suit, are my mother's sisters, and I have known them from my earliest recollection. I have known *George Gray*, the husband of the said Plaintiff, and another Defendant in this suit, for about twenty years. I cannot speak from personal observation to the state of the health of *Mary Margaret Cave*, who was another sister of my mother's, for the few months preceding her death, as I did not see her for at least two years prior to that event; but up to that time I had been in the habit of calling upon her whenever I came to *London*, and know that she was, during that time, a person of retired habits, and of a very nervous and excitable temperament, and also of infirm bodily health, being now and then confined to her room for days and weeks together; and from the accounts which I used to hear of her in the family, I believe that she remained much in the same state during the last few months of her life; and from what I knew of her habits and state of health, and peculiarly nervous temperament, I consider that it would have been a great effort to her during the latter part of her life to make an alteration in her will. I do not mean to say that she was incapable, either in point of bodily or mental capacity of attending to such a matter; but she would have thought it a very serious and important business, and it would, I have no doubt, have been with great difficulty that she could make up her mind to undertake it, and either attend upon or receive any professional gentleman for that purpose.

"I accompanied my aunts, the said Plaintiff and the said Defendant, *Cecilia Cave*, to the Bank of *England* on the 29th July 1845, and was present when the said *Cecilia Cave* made two transfers of stock from the name of the said *Mary Margaret Cave* (who was then deceased, and of whose will the said *Cecilia Cave* was the sole surviving trustee and executrix,) into her own name. The first of these transactions consisted of, first, a sale of 2000*l.* part of the 3*l.* per Cent. Consols, then standing in the name of the said *Mary Margaret Cave*, and a reinvestment of the proceeds in the purchase of 3*l.* per Cent. Reduced Stock, in the name of the said Defendant, *Cecilia Cave*; and the second of the transactions was a transfer of the remainder of the consols, then standing in the name of the said *Mary Margaret Cave*, from her name into that of the said *Cecilia Cave*. These transfers were made in execution and performance of the directions of the will of the said *Mary Margaret Cave*, by which 2000*l.* consols was bequeathed to the said Plaintiff, and the said *Cecilia Cave* was named residuary legatee.

1852.
 GRAY
 v.
 GRAY.

"Mr. *Chant*, then a stockbroker having offices in *Throgmorton-street*, was the broker employed by the said *Cecilia Cave* in effecting the transactions referred to in my answer to the last preceding interrogatory. I believe that the said Mr. *Chant*, if living, is quite incompetent to give evidence as a witness in this suit. The last time I saw him was in the year 1848, and he was then very advanced in age, and quite childish and imbecile; and his memory was so completely gone, that it was with great difficulty that I could bring to his recollection his ever having done any business for my said aunts. It was at the said Mr. *Chant's* suggestion that the legacy of 2000*l.* stock bequeathed to the said

1852.

GRAY
v.
GRAY.

Plaintiff by the said *Mary Margaret Cave's* will, was transferred into the 3l. per Cent. Reduced Stock instead of the 3l. per Cent. Consols; and the reason he gave for that advice was that it would make a distinction between the stock which the said *Cecilia Cave* held as trustee for her sister, the said Plaintiff, and that which was her own property; and that she, the said *Cecilia Cave*, could give the said Plaintiff a power of attorney to receive the dividends on the said reduced stock held for her.

“On the aforesaid occasion of the said transfers being made, the said Defendant, *Cecilia Cave*, stated to me that she should very shortly make an addition of 2000l. to the stock held by her as trustee for her sister, the said Plaintiff, saying that she knew that it had been the intention of her late sister, the said *Mary Margaret Cave*, to increase the legacy to the said Plaintiff to 4000l. stock, and to make an alteration in her will to that effect, and that the said *Mary Margaret Cave* had mentioned this to her on several occasions, and had assigned as her reason for making this alteration, that her brother *David*, to whom she had given a legacy of 2000l., had died since she made her will, and that she wished her sister, *Harriet Gray*, to have it upon the same trusts as the original legacy bequeathed to her; and the said *Cecilia Cave* declared to me that she should carry out her said late sister's instructions, though she had not altered her will, or the said Defendant made a statement to that effect.

“I was not privy to any transfer of stock made by the said *Cecilia Cave* subsequent to the said 29th July 1845; but I believe that on the ensuing 12th August she added 2000l. stock to the said 2000l. 3l. per Cent. Reduced stock, which she held as aforesaid as trustee for the said Plaintiff, making that sum 4000l. of said last-

mentioned stock, instead of 2000*l.* For I was informed of this having been done very shortly after it took place, and I was shown a stock receipt, from which the fact appeared; and I have learnt from the said Plaintiff that she has received the dividends on the sum of 4000*l.* said reduced stock."

1852.
GRAY
v.
GRAY.

Mr. *Walker* and Mr. *Terrell*, for the Plaintiff. They cited *Ex parte Pye* (a), *Thorpe v. Owen* (b), *Ouseley v. Anstruther* (c).

Mr. *Willcock* and Mr. *Taylor*, for the Defendant, *Cecilia Cave*.

Mr. *A. H. Welch*, for *G. Gray*, the husband of the Plaintiff.

The VICE-CHANCELLOR :

The question in this case is, whether a sum of stock, 2000*l.* Reduced Annuities, is so completely impressed with a trust in favour of the Plaintiff, that it is capable of being enforced in a Court of Equity. I must confess that when the case was argued I felt some doubt, but I have, after consideration, come to the conclusion that there is a complete trust impressed upon the stock. The circumstances are somewhat peculiar, but they are short and simple. There were three sisters, *Mary M. Cave*, the testatrix in the cause; the Plaintiff, *Harriet Gray*, a married sister; and the Defendant, *Cecilia Cave*; they had a brother, *David Cave*. *M. M. Cave*, the testatrix, was possessed of considerable property, principally consisting of 3*l.* per Cent. Consols. By her will, dated in November 1843, she gave 2000*l.* 3*l.* per Cent.

(a) 18 Ves. 140. (b) 5 Beav. 224. (c) 10 Beav. 461.

1852.

GRAY

v.

GRAY.

Consols, part of her stock standing in her name, to her brother *David* absolutely. She gave a similar sum of 2000*l.* Consols to *David Cave* and *Cecilia Cave*, as trustees for the benefit of the Plaintiff; and the trusts were, during the joint lives of Mrs. *Gray* and her husband, to her for her separate use; if she survived him, then the stock was to be for her own use; if she died in his lifetime, then it was to fall into the testatrix's residuary personal estate. And she gave the residue to her sister, the Defendant, *Cecilia Cave*, so that there was a legacy of 2000*l.* stock for the absolute benefit of *David Cave*, and 2000*l.* for the benefit of the testatrix's sister, Mrs. *Gray*, on such trusts, that if she should die in the lifetime of her husband, she would not have the absolute benefit.

After the date of the will, the testatrix's brother *David*, one of the trustees of the 2000*l.* given for the benefit of the Plaintiff, died in the lifetime of the testatrix. Now, there is no doubt that the testatrix, during her life expressed her intention to her residuary legatee, *Cecilia Cave*, to give the 2000*l.*, originally intended for her brother, for the benefit of Mrs. *Gray*; and it is clear also upon the evidence, that the Defendant, *Cecilia Cave*, represented that such was the desire of the testatrix. After the death of the testatrix, which took place on the 12th June 1845, the will was proved by *Cecilia Cave* on the 27th June 1845. On the 29th July, the Defendant *Cecilia Cave*, the surviving executrix and the residuary legatee, accompanied by her sister *Harriet Gray*, the Plaintiff, and a nephew, a Mr. *Woodward*, went to the Bank, and, with the assistance of a stockbroker, one *Chant*, for the purpose of executing a transfer of the 2000*l.* stock given for the benefit of Mrs. *Gray*. Mr. *Chant*, it appears, suggested that,

1852.

GRAY

v.

GRAY.

as the testatrix had a considerable sum of consols, which would have to be transferred to the executrix, *Cecilia Cave*, if the 2000*l.* was transferred into the name of *Cecilia Cave* as trustee for Mrs. *Gray*, there would be nothing to distinguish that from the rest of the stock, and that it would be better, in order to distinguish the stock held in trust for Mrs. *Gray*, that the 2000*l.* 3*l.* per Cent. Consols should be converted into 3*l.* per Cents. Reduced. This suggestion was adopted by *Cecilia Cave*, and the stock bequeathed for Mrs. *Gray* was sold out, and with the proceeds they bought 2000*l.* Reduced 3*l.* per Cents., which were transferred into her name to answer the 2000*l.* given for the benefit of Mrs. *Gray*. Now, there is no doubt that the sum of 2000*l.*, 3*l.* per Cents. Reduced, bought and transferred on the 29th July into the name of *Cecilia Cave*, was a complete appropriation of the stock to satisfy the legacy to Mrs. *Gray*, for it was transferred into her name as the sole surviving trustee. If *Daniel Cave* had been living, it must have been transferred into their joint names; there is no doubt, then, that the stock was duly defined and appropriated as Mrs. *Gray's* legacy. On the occasion of this transfer, *Cecilia Cave* stated and represented, and this is proved by the nephew, *Woodward*, who does not appear to have any interest whatever, that it was the intention of the testatrix, after the death of her brother, to increase the legacy given for the benefit of her sister, the Plaintiff, by the addition of a sum similar to that given to her brother. There is, it is true, no direct proof that the testatrix made these declarations, but it is sufficiently proved as against *Cecilia Cave* herself that such was the intention of the testatrix; and *C. Cave* further stated her own intention to carry out the desire of the testatrix, and that she should very shortly make an addition to the stock held by her as trustee. She knew that the

1852.

GRAY
v.
GRAY.

intention of her sister was to increase the legacy to Mrs. Gray to 4000*l.* stock, and she is proved to have stated that the testatrix had mentioned her intention to her on several occasions, and had assigned as a reason that her brother *David* was dead, and said she wished her sister to have it on the same trusts as the original legacy bequeathed to her; and *Cecilia Cave* said she should carry out her sister's intention, although she had not altered her will. It has been suggested that the testatrix would have carried out her intention, but that she was in a state of nervousness or ill health, which made the transaction of any business a great burthen to her, and that she did not, on that ground, carry it into effect. Of this there is no proof, except the evidence of *Woodward* as to the state of health of the testatrix. However, it is clearly proved that *Cecilia Cave* said that the testatrix had expressed *her* intention, and that she *Cecilia Cave* expressed her own intention to carry out the intention of the testatrix; and then the question is, whether *C. Cave* did carry it out so as to impress the additional sum of stock with a trust in favour of *Harriet Gray*. Now the first transfer was on the 29th July. On the 12th of the following August, *C. Cave* went again with Mr. *Chant*, the stockbroker, and sold out stock, and bought the second sum of 2000*l.* 3*l.* per Cents. Reduced, and had it transferred into her own name, making 4000*l.* Reduced Annuities standing in her name; and she executed a power of attorney, by which *Harriet Gray* was authorised to draw the dividends of the whole 4000*l.* stock. Now, the doubt which I have had is, whether *C. Cave* parted with the stock. She retained the legal title. But it must be borne in mind that if she really did mean to carry out the intention she had expressed, the only way to do so would be by doing exactly what she did. She could not

part with the legal control; for if she desired to add 2000*l.* to the sum given by the will, she was bound to place the additional sum in the same way, in the name of the same trustee, and for the same purposes, as the original stock. Now, the original stock, the first 2000*l.*, was given to *David* and *Cecilia* as trustees, and it passed to her as surviving trustee, and the original sum was transferred into her name. The only way of carrying out the intention would be to invest the additional sum in the name of the same trustee. It is said that *C. Cave*, the trustee, is the same as *C. Cave*, the residuary legatee and executrix, and the donor of the second sum of stock; but if they had been different persons, if the original legacy had been given to *A. B.* in trust for *Mrs. Gray*, and *C. Cave* had added 2000*l.* and placed it in the name of *A. B.*, she would have done all that could be done to impress the stock with the original trust. What more, being herself the trustee, could she do than she has done? She might, it is true, have executed a deed declaring the trusts of both sums. But that was not necessary with reference to the legacy; that is, it was not necessary, in order to make the investment of the first 2000*l.* a due appropriation, that any deed should be executed; and if not necessary for the original legacy, neither was it necessary in order to constitute a trust in respect of the further sum. The rule with regard to the question whether a binding trust is constituted is this: if the founder of the trust has not only distinctly expressed the purpose of his act, but has done all that is necessary to complete the design expressed, the Court holds the trust completely imposed. But however clear the intention, still if nothing is done by the party, whether from incapacity or indisposition to do it, the Court will say it cannot decree the performance of the intended

1852.

GRAY

v.

GRAY.

1852.

GRAY

v.

GRAY.

trust. This case, I think, comes within the former rule. *C. Cave* did all that it was necessary to do, in order to impress a trust on the stock in question. She has unfortunately, since these transactions, become of unsound mind, and Mr. *Chant* the stockbroker, who could have given evidence, has, though still living, become subject to infirmity of memory, so that no assistance can be obtained from him; I must therefore decide this case on the evidence of *Woodward* alone; he has no interest whatever in the matter, and his evidence is supported and confirmed by the transactions themselves. I shall therefore declare that the second sum of 2000*l.* was invested on the same trusts as the original legacy.

AN INDEX TO THE PRINCIPAL MATTERS.

ACCUMULATION.

A testator gave his residuary personal estate to A. and B. in trust, to accumulate the income during the life of his niece, and on her death to transfer the capital and accumulations to her children, in equal shares, the shares to be vested in her sons at twenty-one, and in her daughters at that age or marriage. The niece lived more than twenty-one years after the testator's death. Held, that the direction to accumulate was not a provision for raising portions within the meaning of the second section of the Thellusson Act, and that therefore it became void under the first section at the expiration of twenty-one years from the testator's death, and that his next of kin were thenceforth entitled to the income of the capital and accumulations. [*Bourne v. Buckton, Ex parte J. C. Haig and Maria his wife*] 91

ACQUIESCENCE.

1. The defendants, the owners of a cotton mill on the banks of a canal

belonging to the Plaintiffs, were authorized by the Act of Parliament under which the canal was made, and the Plaintiffs incorporated, to draw water from the canal for condensing steam, but not for any other purpose; nevertheless, they used the water for other purposes. In consequence of which the plaintiffs brought an action, and obtained a verdict against them, *but only for nominal damages*. The Defendants moved to arrest the judgment in the action, but without success, and afterwards the judgment was affirmed on a writ of error in the Exchequer Chamber. The Defendants, however, continued to use the water as before. Whereupon the bill was filed for an injunction to restrain them from so doing. The answer stated a case of acquiescence on the part of the Plaintiffs. Held, that the Plaintiffs had sufficiently established their title at law, and that, but for their acquiescence, they would have been entitled to the injunction, notwithstanding they had recovered only nominal damages in the action. [*The*

Rochdale Canal Company v. King]
78

2. What conditions are requisite in order to induce a Court of Equity to grant an injunction to restrain the infringement of a right acquired by long user, to use the water of a stream for certain purposes. [*Wood v. Sutcliffe.*] 163
3. A Plaintiff complained of works intended to be executed by the Defendants, churchwardens of his parish, which he alleged, in the way in which it was proposed to execute them, constituted a nuisance. Much negotiation took place, in the course of which the Defendants showed a continued acquiescence in the suggestions made by the Plaintiff as to the mode of executing the works, and suspended their execution. While these negotiations were still going on, and before any works were commenced, the Plaintiff filed his bill for an injunction, and obtained special leave to give notice of motion. On the day following the service of the notice of motion, the Defendants, in order to avoid litigation, passed a resolution at a vestry, at which the Plaintiff was present, that the works should be wholly abandoned. Afterwards the Plaintiff brought on his motion. The court, without going into the question whether there would be any nuisance, held, that, under the circumstances, the motion was useless and improper, and it was refused, with costs. [*Woodman v. Robinson*] 204

AGREEMENT.

A purchase was to be completed on the 25th of October. Before that day arrived, the purchaser, at the vendor's request, extended the time

to the 5th of November. The title, however, was not completed on that day. Held, that the purchaser was at liberty to abandon the contract. [*Parkin v. Thorold*] . 1

ANNUAL PROFITS.

Testator, tenant for life under a settlement of the B. H. estate and other lands, remainder to his first and other sons in tail male, remainder to A., his brother, for life, with remainder to his first and other sons in tail male, remainder to other brothers of the testator in like manner, and after other intermediate limitations, remainder over to the sisters of the testator, as tenants in common in tail general. The testator by his will gave certain specific things to be enjoyed by the person or persons who for the time being should be entitled to the freehold or inheritance of the family estate at Stapleton, as and in the nature of heirlooms. He gave his furniture, plate, &c., to his brother A. He directed a sum of 1000*l.*, secured to him on the B. H. estate and other estates, to sink into the freehold and inheritance of the said estates, that the same might merge therein, and the *rents and arrears of rent, with timber felled and other annual profits due to him at the time of his decease from the B. H. estate*, unto the person or persons who should be entitled to the freehold and inheritance of the same estate in possession on his decease. He gave his residue to his two brothers B. and C., and he appointed his brother A. his sole executor. B. died in the testator's lifetime. Held, that certain prepared brick earth dug out of the estate by the tenant for life, and lying upon it at his death, and certain tiles so

made and remaining on the estate, were comprised in and passed by the words "other annual profits." [*Stapleton v. Stapleton*] . 212

APPOINTMENT.

A testatrix having a general power of appointment over a sum of stock under the will of T. S., appointed the stock to her sons Joseph and John and her other children, equally, and she left any other sum of money or property to which she then was or might thereafter become entitled under the will of T. S. to be divided amongst such of her children as might be living at her death, and she constituted Joseph her residuary legatee. John died before her. Held, that Joseph was entitled to the share of the stock intended for John. [*In the matter of Spooner's trust, Ex parte Isabella Mouritz, widow, and others*] 129

APPORTIONMENT.

See WILL, 5.

BALANCES.

In an administration suit, the pleadings raised questions of wilful default, and liability to pay interest on balances in hand against executors; but the decree taken at the original hearing neither contained any declaration against the executors, nor any inquiries as to wilful default, but was merely a decree for the common account of what had been received. Held, that the court could not, on further directions, make any decree for wilful default; but that the question of interest on balance in hand was still open. General principle on which the court proceeds in making declarations in directing inquiries as to wilful default, and interest on balances in the hands of executors

or trustees. The balances remaining in the hands of the executors were very small. The testatrix died in 1823. The Plaintiff became a bankrupt in 1829; and in 1834, procured his assignees to re-assign all his interest to him. Neither he nor his assignees up to that time had made any application for payment. In 1835, the Plaintiff filed his bill for an account, and allowed it to be dismissed for want of prosecution in 1840; in 1842, he filed the present bill, and asked for interest on balances. Held, that under these circumstances he was not entitled to it. [*Jones v. Morrell*] 241

BELL-RINGING.

Injunction granted after a trial at law to restrain the ringing of the bells of a Roman Catholic Church so as to occasion any nuisance, disturbance, and annoyance to the Plaintiff, who resided very near to the church. A bill may be filed to restrain a public nuisance, without making the Attorney-General a party, if the Plaintiff sustains special damage from the nuisance. [*Soltau v. De Held*] 133

CHARITABLE USES.

A testator, by his will, directed that his residuary personal and real estate should be sold, and the proceeds vested in some government annuity for the benefit of his wife, L. Lloyd, and of A., for their joint lives, and at the death of either of them her share to go to the survivor. And he directed L. Lloyd and A., out of the annuities they received, to keep in good and sound repair a certain tomb and vault belonging to him, and to paint it, "and in default or failure they shall lose and forfeit their claims to the annuities, and any person hereafter

that shall receive the annuities shall be bound to perform the same conditions." Held, that the condition annexed to the gift of the annuities to L. Lloyd and A. to keep his tomb in repair was good. By a codicil, the testator gave the rent of a copyhold house for the benefit of his wife and A., to be applied as in his will set forth, subject to all the conditions contained in his will, share and share alike; and after the death of his wife and A., or in default of their, L. Lloyd and A., not fulfilling the conditions contained in his will, he gave the said house upon trust for the minister and churchwardens of St. Mary's, Chatham, to apply the rents as follows: to take 5*l.* *per annum* for themselves out of the rents, to keep the tomb in repair; and the residue and remainder of the rent to be applied for the benefit of his nephew, and, after the death of his nephew, the remainder of the rent to be applied for the benefit of the Church Missionary Society. At the original hearing, the devise to the ministers and churchwardens was declared void, and they were dismissed. Held, that this decree was conclusive against the whole of the gift to the churchwardens, and that all the trusts failed. [*Lloyd v. Lloyd*] 255

COMPANY.

See JOINT-STOCK COMPANY.

CONDITION.

A testator, by his will, directed that his residuary personal and real estate should be sold, and the proceeds vested in some government annuity for the benefit of his wife, L. Lloyd and of A., for their joint lives, and at the death of either of them her share to go to the survivor; "and in case either L. Lloyd

or A. should marry or to live in a state of adultery, then her share shall pass to the other, the same as if death had taken place; and should L. Lloyd and A. both marry, then their shares and interest shall pass to my nephew H. in case L. Lloyd and A. fail in fulfilling the conditions of this my will." And he directed L. Lloyd and A., out of the annuities they received, to keep in good and sound repair a certain tomb and vault belonging to him, and to paint it, "and in default or failure they shall lose and forfeit their claims to the annuities, and any person hereafter that shall receive the annuities shall be bound to perform the same conditions." Held, that as between L. Lloyd, the widow, and A. the gift over to A. upon L. Lloyd marrying was good; but the condition against A. marrying was void; that the gift over in the case of both marrying, was void; and that the condition annexed to the gift of the annuities to L. Lloyd and A. to keep his tomb in repair was good. [*Lloyd v. Lloyd*] 255

CONSTRUCTION.

1. Testatrix gave legacies to her son, *John Bryan*, and to her daughters, *Ann*, the wife of *James Winson*, *Harriet*, the wife of *William Darnborough*, and *Mary*, the wife of *William Dadley*; and she gave her stock in the Bank to her said daughter, *Mary Dadley* for life, and after her death to be equally divided between the husbands of her said daughters and her son, or such of them as might be living at *Mary Dadley's* decease. All the husbands named in the will survived the testatrix, but *William Darnborough* was the only one of them who survived *Mary Dadley*.

Ann Winson, however, married a second time, and her second husband was living at *Mary Dudley's* death, and he claimed a share of the stock; but the court held that, by the words, "the husbands of my said daughters," the testatrix meant their husbands, *whom she had named*, and therefore that *William Darnborough* was exclusively entitled to the stock. [*In the matter of Bryan's trust, Ex parte W. Darnborough*]

103

2. Testator directed that a sum of stock, standing in his name, should be divided between and amongst the relations of his late wife, in such manner, shares, and proportions as would have been the case in case she had died possessed of it, a spinster and intestate. The wife had sixteen next of kin living at her death. Five of them died before the testator. Held, that the eleven survivors took only a sixteenth each, and that the other five shares lapsed into the residue. [*In the matter of Ham's trust, Ex parte Biles*]

106

3. Testator by his will gave "all my property of whatever description, whether in possession, reversion, remainder, or expectancy, or which I may be possessed of at the time of my death, and I give and bequeath the same and every part thereof unto my dear wife Jane, *her executors, administrators, and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her that she shall dispose of the same to and for the joint benefit of herself and my children.* The court gave an opinion that there was no trust created for the children; but, declining to make a positive declaration to that effect, held that it would be right to order the residu-

ary personal estate to be transferred and paid to the widow, and decreed accordingly. [*Webb v. Woods*] 267

4. A testator, by his will, directed that his residuary personal and real estate should be sold, and *the proceeds vested in some government annuity* for the benefit of his wife, L. Lloyd, and of A., for their joint lives, and at the death of either of them her share to go to the survivor; "and in case either L. Lloyd or A. should marry or to live in a state of adultery, then her share shall pass to the other, the same as if death had taken place; and should L. Lloyd and A. both marry, then their shares and interest shall pass to my nephew H. in case L. Lloyd and A. fail in fulfilling the conditions of this my will." And he directed L. Lloyd and A., out of the annuities they received, to keep in good and sound repair a certain tomb and vault belonging to him, and to paint it, "and in default or failure they shall lose and forfeit their claims to the annuities, and any person hereafter that shall receive the annuities shall be bound to perform the same conditions." Held, that as between L. Lloyd, the widow, and A. the gift over to A. upon L. Lloyd marrying was good; but the condition against A. marrying was void; that the gift over in the case of both marrying was void; and that the condition annexed to the gift of the annuities to L. Lloyd and A. to keep his tomb in repair was good. By a codicil, the testator gave the rent of a copyhold house for the benefit of his wife and A., to be applied as in his will set forth, subject to all the conditions contained in his will, share and share alike; and after the death of his

wife and A., or in default of their, L. Lloyd and A., not fulfilling the conditions contained in his will, he gave the said house upon trust for the minister and churchwardens of St. Mary's, Chatham, to apply the rents as follows : to take *5l. per annum* for themselves out of the rents, to keep the tomb in repair ; and the residue and remainder of the rent to be applied for the benefit of his nephew, and, after the death of his nephew, the remainder of the rent to be applied for the benefit of the Church Missionary Society. At the original hearing the devise to the ministers and churchwardens was declared void, and they were dismissed. Held, that this decree was conclusive against the whole of the gift to the churchwardens, and that all the trusts failed ; that the widow and A. took the legal estate in the rents during their joint lives, and the life of the survivor ; with remainder to the customary heir of the testator. [*Lloyd v. Lloyd*] 255

5. A testator who had two sons and one daughter gave the interest and dividends and annual proceeds of 3000*l.* stock, standing in his name, to W., one of his children, for life, and, after his decease, he gave the said principal stock or sum of 3000*l.* unto all and every the child and children of W., to be equally divided between and amongst them, if more than one, share and share alike, and, if but one, the whole to such one, to be paid or transferred to him, her, or them, on his, her, or their attaining twenty-one, and the interest to be in the mean time applied for maintenance and education ; he gave similar legacies to each of his other two children and their children ; "and upon the death of either of my said sons or

daughters without issue, then I direct that the interest, dividends, and produce so as aforesaid given and bequeathed to him, her, or them so dying shall be paid and payable to the survivors or survivor of them, my said sons and daughters in equal shares and proportions." The testator's son W. survived him, and had one child, who pre-deceased him. Held, that the limitation over referred to the death of either of the testator's children, without leaving issue living at his death ; that the child of W. took a vested interest at his birth, but liable to be divested by the death of W. without leaving issue living at his death ; and that the gift over therefore took effect. [*Westwood v. Southey*] 192

See REPUGNANCY.

CONVERSION.

21st September, 1778. Settlement or articles, on the marriage of *William*, afterwards *Earl Harcourt*. By a marriage settlement, dated in 1778, 32,000*l.* was directed to be invested in land, which was to be conveyed to the use of the husband for life, to the use that the wife might receive a jointure of 300*l.* a year ; to the use of trustees for a term to secure the jointure, and to raise 5000*l.* for the wife after the husband's death ; to the use of trustees for another term, to raise portions for the children of the marriage ; and to the use of the husband's right heirs. There never was any issue of the marriage. The trustee invested 20,000*l.* of the 32,000*l.* on mortgage, and the rest in the funds. In 1823 the husband made a statement of *his personal property*, in which he included both the mortgage money and the stock. In 1828 he and

the mortgagee, and one of the trustees, executed a deed by which the mortgage money, as well as the interest of it, was treated as payable to him, his *executors or administrators*, and by which he covenanted that the principal should not be called in for five years by him, his *executors or administrators*, or by the trustees, in case the interest should be regularly paid. Afterwards, in the same year, he made his will, by which he made a provision for his wife (which she accepted) in satisfaction of the provision made for her by the settlement, and devised all his real estate to trustees in trust, to convey them to certain of his relations for their lives successively, with remainders to their first and other sons in tail male, and ultimately to his own right heirs; and he gave 80,000*l.* to the same trustees, and directed them to invest it in land, and to settle the land in the same manner as he had directed his real estates to be settled. He died in 1830. Held, that he had elected to treat, and had treated the 32,000*l.* as part of his *personal estate*, and that it remained personalty at his death. [*Harcourt v. Seymour*] 12

COSTS.

See PRACTICE, 2.

CREDITOR'S SUIT.

A voluntary assignee of a debt due from a person deceased, cannot maintain a suit for the administration of the deceased estate. [*Sewell v. Moxey*] 189

DECREE.

1. In a suit for the administration of an estate, in which an infant is interested, it is not necessary to present a petition for a reference as Vol. II. N.S.

to the maintenance of the infant. The Court will direct the reference by the decree. [*Cross v. Beavan*] 53

2. In an administration suit, the pleadings raised questions of wilful default, and liability to pay interest on balances in hand, against executors; but the decree taken at the original hearing neither contained any declaration against the executors, nor any inquiries as to wilful default, but was merely a decree for the common account of what had been received. Held, that the Court could not, on further directions, make any decree for wilful default; but that the question of interest on balances in hand was still open. General principle on which the Court proceeds in making declarations in directing inquiries as to wilful default, and interest on balances in the hands of executors or trustees. The balances remaining in the hands of the executors were very small. The testatrix died in 1823. The Plaintiff became a bankrupt in 1829; and in 1834, procured his assignees to re-assign all his interest to him. Neither he nor his assignees up to that time had made any application for payment. In 1835, the Plaintiff filed his bill for an account, and allowed it to be dismissed for want of prosecution in 1840; in 1842, he filed the present bill, and asked for interest on balances. Held, that, under these circumstances, he was not entitled to it. [*Jones v. Morral*] 241

DELAY.

See JOINT-STOCK WINDING-UP COMPANIES ACT, 1.

DIVESTING.

See WILL, 9.

ELECTION.

1. 21st September 1778. Settlement or articles on the marriage of *William*, afterwards Earl *Harcourt*. By a marriage settlement, dated in 1778, 32,000*l.* was directed to be invested in land, which was to be conveyed to the use of the husband for life; to the use that the wife might receive a jointure of 800*l.* a year; to the use of trustees for a term, to secure the jointure, and to raise 5000*l.* for the wife, after the husband's death; to the use of trustees, for another term, to raise portions for the children of the marriage; and to the use of the husband's right heirs. There never was any issue of the marriage. The trustees invested 20,000*l.* of the 32,000*l.* on mortgage, and the rest in the funds. In 1823, the husband made a statement of *his personal property*, in which he included both the mortgage money and the stock. In 1828, he and the mortgagee and one of the trustees executed a deed by which the mortgage money, as well as the interest of it, was treated as payable to him, his *executors or administrators*, and by which he covenanted that the principal should not be called in for five years by him, his *executors or administrators*, or by the trustees, in case the interest should be regularly paid. Afterwards, in the same year, he made his will, by which he made a provision for his wife (which she accepted) in satisfaction of the provision made for her by the settlement, and devised all his real estates to trustees in trust, to convey them to certain of his relations for their lives successively, with

remainders to their first and other sons in tail male, and ultimately to his own right heirs, and he gave 80,000*l.* to the same trustees, and directed them to invest it in land, and to settle the land in the same manner as he had directed his real estates to be settled. He died in 1830. Held, that he had elected to treat and had treated the 32,000*l.* as part of *his personal estate*, and that it remained personalty at his death. [*Harcourt v. Seymour*] 12

2. In April 1811, A. conveyed an estate (which stood limited to him and his trustee *to the usual uses to bar dower*) to a mortgagee in fee, subject to a proviso for the reconveyance thereof to him, his heirs, appointees or assigns, or to such other person or persons, to such uses and in such manner as he or they should direct. In May following he devised all his messuages, lands, &c. and all other his real estate, or which he had contracted to purchase, situate in or near the parishes of B. and S. or elsewhere in England, of or to which he or any person or persons in trust for him, was or were seised or entitled for any estate of freehold and inheritance, or of freehold only in possession, reversion, remainder, or expectancy, or which he had power to dispose of or appoint by his will, to J. D., a stranger to him in blood, and his heirs, to certain uses and upon certain trusts. In 1813, he paid off the mortgage and took a reconveyance, by which, after reciting the mortgage, the premises were limited to him and his trustee, *to the usual uses to bar dower*. In 1809, he purchased an estate in one of the parishes mentioned in his will at an auction; and in November 1811, that estate was conveyed to

him and his trustee *to the usual uses to bar dower*. Held, that the reconveyance of 1813 and the conveyance of 1811 revoked the will as to the mortgaged premises and purchased estates respectively, and that the testator's heir (who was entitled to benefits under the will) was not bound to elect. [*Plowden v. Hyde*] 171

ESTATE TAIL.

A testator, who died in 1833, devised his residuary real and personal estate to his eldest son and his heirs, executors, &c. provided and his will was, that in case his said son *should die without leaving any lawful issue of his body*, such part of his said residuary estate as was freehold and situate in certain places should *at his death* be divided into two equal parts, one of which he gave to his second son and his heirs, and the other, to his daughter and her heirs. Held, as to such part of the testator's residuary estate, as was freehold and situate in the places named, that his eldest son took, not an estate tail in it, but an estate in fee, with an executory devise over to take effect at his death, in case he should have no issue then living. [*In the matter of the Wilts, Somerset, and Weymouth Railway Company's Act, and of the Lands Clauses Consolidation Act 1845, and Ex parte Matthew Davies, the younger*] 114

EXECUTOR.

1. When loans are made to an executor upon his personal security, without any security or contract for a security, upon the assets being made at the time and afterwards a security on the assets is given, the

Court will not assume that the loan was for the purposes of the administration of the estate, but will direct an inquiry whether it was so applied. [*Miles v. Durnford*] 239

2. In an administration suit, the pleadings raised questions of wilful default, and liability to pay interest on balances in hand against executors; but the decree taken at the original hearing neither contained any declaration against the executors, nor any inquiries as to wilful default, but was merely a decree for the common account of what had been received. Held, that the Court could not, on further directions, make any decree for wilful default; but that the question of interest on balances in hand was still open. General principle on which the Court proceeds in making declarations in directing inquiries as to wilful default, and interest on balances in the hands of executors or trustees. The balances remaining in the hands of the executors were very small. The testatrix died in 1823. The Plaintiff became a bankrupt in 1829; and in 1834, procured his assigns to re-assign all his interest to him. Neither he nor his assignees up to that time had made any application for payment. In 1835, the Plaintiff filed his bill for an account, and allowed it to be dismissed for want of prosecution in 1840; in 1842, he filed the present bill, and asked for interest on balances. Held, that, under these circumstances, he was not entitled to it. [*Jones v. Morrell*] 241

EXECUTORY DEVISE.

A testator, who died in 1833, devised his residuary real and personal estate

to his eldest son and his heirs, executors, &c. provided, and his will was that, in case his said son *should die without leaving any lawful issue of his body*, such part of his said residuary estate as was freehold, and situate in certain places, should *at his death* be divided into two equal parts, one of which parts he gave to his second son and his heirs, and the other to his daughter and her heirs. Held, as to such part of the testator's residuary estate as was freehold and situate in the places named, that his eldest son took, not an estate tail in it, but an estate in fee, with an executory devise over to take effect at his death, in case he should have no issue then living. [*In the matter of the Wilts, Somerset, and Weymouth Railway Company's Act, and of the Lands Clauses Consolidation Act 1845, Ex parte Matthew Davies, the younger*] 114

FATHER AND CHILD.

A father left his home, where he was residing with his wife and children, infants, four daughters, then ten, nine, eight, and four years of age, and two sons aged six and three years. He was apprehended, committed, and arraigned for the commission of an unnatural crime, but no witnesses appearing he was acquitted. He immediately left *England*, and remained abroad eight months. Five years after the trial he petitioned this Court praying that his wife might be ordered to deliver up the children (the daughters being fifteen, fourteen, thirteen and nine years old, and the sons eleven and eight years), and, if necessary, that writs of *habeas corpus* might issue for that purpose. The petition was supported by the affi-

davit of the petitioner, and was served on the wife only. Affidavits were filed on behalf of the respondent, and amongst them an affidavit of the solicitor of the wife, who had been the solicitor for the petitioner, and in that capacity had interviews with him while in gaol awaiting his trial, offering to state conversations that took place between them if authorized by the petitioner so to do, and an affidavit by another witness referring as an exhibit to the depositions taken before the magistrates. The petitioner himself made two affidavits in reply, in one of which he denied the charge against him, and in the other, sworn three days later, he again denied the charge, and gave an explanation of the cause why he was at the place where and in the company in which he was when apprehended. The Court being satisfied upon the materials before it that the petitioner had so conducted himself as that he ought to be treated as if he were a guilty man, dismissed the petition. The Court will refuse to give possession of children to their father if he has so conducted himself as that it will not be for the benefit of the infants, or if it will affect their happiness, or if they cannot associate with him without moral contamination, or if, because they associate with him, others will shun their society. If it be established to the satisfaction of the Court that the father of children from ten to two years of age is to be considered as guilty of the perpetration of an unnatural crime, it is impossible to permit any sort of intercourse with his children, even after he has escaped conviction. *Seemle*, that, under such circumstances, if the children were with the father it would be the

- duty of the Court to remove them.
[Anonymous] 54

INFANT.

- 1. In a suit for the administration of an estate in which an infant is interested, it is not necessary to present a petition for a reference as to the maintenance of the infant. The Court will direct the reference by the decree. [*Cross v. Beavan*] 53
2. A father left his home, where he was residing with his wife and children, infants, four daughters, then ten, nine, eight, and four years of age, and two sons aged six and three years. He was apprehended, committed, and arraigned for the commission of an unnatural crime, but no witnesses appearing he was acquitted. He immediately left *England*, and remained abroad eight months. Five years after the trial he petitioned this Court, praying that his wife might be ordered to deliver up the children (the daughters being fifteen, fourteen, thirteen, and nine years old, and the sons eleven and eight years), and, if necessary, that writs of *habeas corpus* might issue for that purpose. The petition was supported by the affidavit of the petitioner, and was served on the wife only. Affidavits were filed on behalf of the respondent, and amongst them an affidavit of the solicitor of the wife, who had been the solicitor for the petitioner, and in that capacity had interviews with him while in gaol awaiting his trial, offering to state conversations that took place between them if authorized by the petitioner so to do, and an affidavit by another witness referring as an exhibit to the depositions taken before the magistrates. The petitioner himself made two affidavits

in reply, in one of which he denied the charge against him, and in the other, sworn three days later, he again denied the charge, and gave an explanation of the cause why he was at the place where and in the company in which he was when apprehended. The Court being satisfied, upon the materials before it, that the petitioner had so conducted himself as that he ought to be treated as if he were a guilty man, dismissed the petition. The Court will refuse to give possession of children to their father if he has so conducted himself as that it will not be for the benefit of the infants, or if it will affect their happiness, or if they cannot associate with him without moral contamination, or if because they associate with him others will shun their society. If it be established to the satisfaction of the Court that the father of children from ten to two years of age is to be considered as guilty of the perpetration of an unnatural crime, it is impossible to permit any sort of intercourse with his children, even after he has escaped conviction. *Semble*, that, under such circumstances, if the children were with their father, it would be the duty of the Court to remove them. [Anonymous] . . . 54

INJUNCTION.

1. The Defendants, the owners of a cotton mill on the banks of a canal belonging to the Plaintiffs, were authorized, by the Act of Parliament under which the canal was made and the Plaintiffs incorporated, to draw water from the canal, for condensing steam, but not for any other purpose; nevertheless they used the water for other purposes. In consequence of which, the Plaintiffs brought an action,

and obtained a verdict against them, *but only for nominal damages*. The Defendants moved to arrest the judgment in the action, but without success, and afterwards the judgment was affirmed on a writ of error in the Exchequer Chamber. The Defendants, however, continued to use the water as before; whereupon the bill was filed for an injunction to restrain them from so doing. The answer stated a case of acquiescence on the part of the Plaintiffs. Held, that the Plaintiffs had sufficiently established their title at law, and that, but for their acquiescence, they would have been entitled to the injunction, notwithstanding they had recovered only nominal damages in the action. [*The Rochdale Canal Company v. King*] 78

2. Injunction granted, after a trial at law, to restrain the ringing of the bells of a Roman Catholic church so as to occasion any nuisance, disturbance, and annoyance to the Plaintiff, who resided very near to the church. A bill may be filed to restrain a public nuisance without making the *Attorney-General* a party, if the Plaintiff sustains special damage from the nuisance. [*Soltau v. De Held*] . . . 133
3. What conditions are required in order to induce a Court of Equity to grant an injunction to restrain the infringement of a right acquired by long user to use the water of a stream for certain purposes. [*Wood v. Sutcliffe*] . . . 163

IRREGULARITY.

In a suit by adults and infants, the next friend was changed by an order of the Court, on the application for which the original next friend appeared. The adult Plaintiffs

obtained an order of course at the Rolls for changing the solicitor, on a petition representing the original next friend as next friend, and stating incorrectly that the order changing the next friend had not been drawn up, passed, or entered. Held, that the order so obtained at the Rolls was irregular. A motion by the next friend of infants, describing himself as such in the notice of motion, is irregular. The motion should be by the infants by their next friend. [*Pidduck v. Boulbee*] 223

JOINT-STOCK COMPANY.

The members of a completely formed joint-stock company are not liable for the expenses incurred in attempting to form the company, unless they have made themselves liable, either expressly or impliedly, after the completed formation of the company. Therefore, where the charges in a solicitor's bill for business done for the company before its complete formation could not be distinguished from the charges for business done subsequently, the Court held that the Master charged with the winding up of the company had rightly allowed the bill only as a claim, with liberty to the solicitor to bring such action as he might be advised. [*In the Winding up of the Independent Assurance Company, Terrell's case*] 126

JOINT-STOCK COMPANIES WINDING-UP ACTS.

1. A petition to discharge a winding-up order, dismissed with costs, on account of delay in presenting it. [*In the matter of the Winding-up Acts and of the Chepstow, Gloucester, and Forest of Dean Railway Company*] 11

2. The members of a completely formed joint-stock company are not liable for the expenses incurred in attempting to form the company, unless they have made themselves liable, either expressly or impliedly, after the complete formation of the company. Therefore, where the charges in a solicitor's bill for business done for the company before its complete formation could not be distinguished from the charges for business done subsequently, the Court held that the Master charged with the winding-up of the company had rightly allowed the bill only as a claim, with liberty to the solicitor to bring such action as he might be advised. [*In the Winding-up of the Independent Assurance Company, Terrell's case*] . 126

MAINTENANCE.

In a suit for the administration of an estate in which an infant is interested, it is not necessary to present a petition for a reference as to the maintenance of the infant. The Court will direct the reference by the decree. [*Cross v. Beavan*] 53

MISJOINDER.

- A., the surviving executor of B., filed a bill to set aside a mortgage of the assets, made by C., the deceased executor of B. A. was also the representative of C. Held, that A. could not sever his character of representative of the original testator, in which he had title to sue, from that of representative of C., in which he could not sue, to set aside his testator's deed; and on this ground the bill was dismissed. [*Miles v. Durnford*] 234

MOTION.

In a suit by adults and infants, the next friend was changed by an order of the Court, on the application for which the original next friend appeared. The adult Plaintiffs obtained an order of course at the Rolls for changing the solicitor, on a petition representing the original next friend as next friend, and stating incorrectly that the order changing the next friend had not been drawn up, passed, or entered. Held, that the order so obtained at the Rolls was irregular. A motion by the next friend of infants, describing himself as such in the notice of motion, is irregular. The motion should be by the infants by their next friend. [*Pidduck v. Boulton*] 223

NUISANCE.

1. Injunction granted, after a trial at law, to restrain the ringing of the bells of a Roman Catholic church so as to occasion any nuisance, disturbance, and annoyance to the Plaintiff, who resided very near to the church. A bill may be filed to restrain a public nuisance without making the *Attorney-General* a party, if the Plaintiff sustains special damage from the nuisance. [*Soltau v. De Held*] 133
2. A bill was filed by a single parishioner against some of the churchwardens of the parish, alleging an intention on the part of the Defendants to execute works in the church which would be injurious to himself, and praying an injunction. The Plaintiff did not allege any right of property in a particular pew, but did allege that he was a parishioner, and that he was in the habit of attending divine service in the parish church. *Quære*,

whether this is a private nuisance, and whether such a bill can be sustained by a single parishioner against the churchwardens. A Plaintiff complained of works intended to be executed by the Defendants, churchwardens of his parish, which he alleged in the way in which it was proposed to execute them constituted a nuisance. Much negotiation took place, in the course of which the Defendants showed a continued acquiescence in the suggestions made by the Plaintiff as to the mode of executing the works, and suspended their execution. While these negotiations were still going on, and before any works were commenced, the Plaintiff filed his bill for an injunction, and obtained special leave to give notice of motion, and served the notice of motion. On the day following the service of the notice of motion, the Defendants, in order to avoid litigation, passed a resolution at a vestry, at which the Plaintiff was present, that the works should be wholly abandoned. After that the Plaintiff brought on his motion. Held, without going into the question whether there would be any nuisance, that, under the circumstances, the motion was useless and improper; and it was refused with costs. [*Woodman v. Robinson*] 204

PLEADING.

1. Injunction granted after a trial at law to restrain the ringing of the bells of a Roman Catholic church so as to occasion any nuisance, disturbance, and annoyance to the Plaintiff, who resided very near the church. A bill may be filed to restrain a public nuisance without making the Attorney-General a

party, if the Plaintiff sustains special damage from the nuisance. [*Soltau v. De Held*] . . . 133

2. A., the surviving executor of B., filed a bill to set aside a mortgage of the assets made by C., the deceased executor of B. A. was also the representative of C. Held, that A. could not sever his character of representative of the original testator, in which he had title to sue, from that of representative of C., in which he could not sue to set aside his testator's deed; and on this ground the bill was dismissed. [*Miles v. Durnford*] . . . 234
3. A voluntary assignee of a debt due from a person deceased cannot maintain a suit for the administration of the deceased's estate. [*Seowell v. Mossy*] 189

POWER.

- A testatrix, having a general power of appointment over a sum of stock under the will of T. S., appointed the stock to her sons *Joseph* and *John*, and her other children equally; and she left any other sum of money or property to which she then was or might thereafter become entitled under the will of T. S. to be divided amongst such of her children as might be living at her death; and she constituted *Joseph* her residuary legatee: *John* died before her. Held, that *Joseph* was entitled to the share of the stock intended for *John*. [*In the matter of Spooner's Trust, Ex parte Isabella Mouritz, widow, and Others*] 129

PRACTICE.

1. In a suit for the administration of an estate in which an infant is interested, it is not necessary to present a petition for a reference as

- to the maintenance of the infant. The Court will direct the reference by the decree. [*Cross v. Beavan*] 53
2. Testator directed that a sum of stock standing in his name should be divided between and amongst the relations of his late wife, in such manner, shares, and proportions, as would have been the case in case she had died possessed of it, a spinster and intestate. The wife had sixteen next of kin living at her death; five of them died before the testator. Held, that the eleven survivors took only a sixteenth each, and that the other five shares lapsed into the residue, and ought to bear the costs of the petitioners and respondents. [*In the matter of Ham's Trust, Ex parte Biles*] 106
3. In a suit by adults and infants, the next friend was changed by an order of the Court, on the application for which the original next friend appeared. The adult Plaintiffs obtained an order of course at the Rolls for changing the solicitor, on a petition representing the original next friend as next friend, and stating incorrectly that the order changing the next friend had not been drawn up, passed or entered. Held, that the order so obtained at the Rolls was irregular. A motion by the next friend of infants, describing himself as such in the notice of motion, is irregular. The motion should be by the infants by their next friend. [*Pidduck v. Boulton*] . . . 223
4. In an administration suit, the pleadings raised questions of wilful default, and liability to pay interest on balances in hand against executors; but the decree taken at the original hearing neither contained any declaration against the executors, nor any inquiries as to

wilful default, but was merely the decree for the common account of what had been received. Held, that, the Court could not, on further directions, make any decree for wilful default; but that the question of interest on balances in hand was still open. General principle on which the Court proceeds in making declarations in directing inquiries as to wilful default, and interest on balances in the hands of executors or trustees. The balances remaining in the hands of the executors were very small. The testatrix died in 1823. The Plaintiff became a bankrupt in 1829; and in 1834, procured his assignees to re-assign all his interest to him. Neither he nor his assignees up to that time had made any application for payment. In 1834, the Plaintiff filed his bill for an account, and allowed it to be dismissed for want of prosecution in 1840; in 1842, he filed the present bill, and asked for interest on balances. Held, that, under these circumstances, he was not entitled to it. [*Jones v. Morrell*] . 241

PRECATORY WORDS.

Testator, by his will, gave "all my property of whatever description, whether in possession, reversion, remainder, or expectancy, or which I may be possessed of at the time of my death, and I give and bequeath the same and every part thereof unto my dear wife, Jane, her executors, administrators, and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her that she shall dispose of the same to and for the joint benefit of herself and my children." The Court gave an opinion that there

was no trust created for the children, but declining to make a positive declaration to that effect. Held, that it would be right to order the residuary personal estate to be transferred and paid to the widow, and decreed accordingly. [*Webb v. Woods*] 267

RENTS.

See WILL, 5.

REPUGNANCY.

A testator gave various specific portions of personal estate to his wife, for and during her natural life, if she should so long continue his widow; but at her death, or in case she should marry again, then he gave all the things before given, adding the words, "and effects, and also all my household furniture, which I hereby give to her for her sole use and benefit for and during the term of her natural life, if she shall so long continue my widow," to be equally divided among the children that he then had, or might thereafter have, by his said wife; but in case his wife should not marry again after his decease, he gave her "all and every his personal estate and effects whatsoever" for her life, and the same to be equally divided to and amongst such of his children as should be living at her decease, share and share alike. The testator died within three weeks after making his will. Held, first, that the first gift was not merely specific, but passed the whole of his personal estate; secondly, that the two clauses were not repugnant; but the first was intended to apply to the case of the widow marrying again; and the second, to the case of her not marrying again; and the

latter event being that which happened, the children living at the death of the widow were alone entitled, to the exclusion of representatives of deceased children. [*Wiggins v. Wiggins*] . . . 226

REVOCATION.

In April 1811, A. conveyed an estate (which stood limited to him and his trustee, *to the usual uses to bar the dower*) to a mortgagee in fee, subject to a proviso for the re-conveyance thereof to him, *his heirs, appointees, or assigns, or to such other person or persons, to such uses, and in such manner as he or they should direct*. In May following, he devised all his messuages, lands, &c., and all other his real estate, or which he had contracted to purchase, situate in or near the parishes of B. and S., or elsewhere in England, of or to which he or any person or persons in trust for him was or were seised or entitled, for any estate of freehold and inheritance, or of freehold only, in possession, reversion, remainder, or expectancy, or which he had power to dispose of or appoint by his will, to J. D., a stranger to him in blood, and his heirs, to certain uses and upon certain trusts. In 1813, he paid off the mortgage and took a re-conveyance, by which, after reciting the mortgage, the premises were limited to him and his trustee *to the usual uses to bar dower*. In 1809, he purchased an estate in one of the parishes mentioned in his will, at an auction, and in November 1811, that estate was conveyed to him and his trustee *to the usual uses to bar dower*. Held, that the re-conveyance of 1813, and the conveyance of 1811, revoked the will as to the mortgaged

premises and purchased estate respectively, and that the testator's heir (who was entitled to benefits under the will) was not bound to elect. [*Plowden v. Hyde*] 171

SPECIFIC LEGACY.

A testator gave various specific portions of personal estate to his wife *for and during her natural life, if she should so long continue his widow*; but at her death, or in case she should marry again, then he gave all the things before given, adding the words "and effects, and also all my household furniture, which I hereby give to her for her sole use and benefit for and during the term of her natural life, if she shall so long continue my widow," to be equally divided among *the children that he then had, or might thereafter have, by his said wife*; but in case his wife should not marry again after his decease, he gave her "all and every his personal estate and effects whatsoever" for her life, and the same to be equally divided to and amongst *such of his children as should be living at her decease*, share and share alike. The testator died within three weeks after making his will. Held, first, that the first gift was not merely specific, but passed the whole of his personal estate; secondly, that the two clauses were not repugnant, but the first was intended to apply to the case of the widow marrying again; and the second, to the case of her not marrying again; and the latter event being that which happened, the children living at the death of the widow were alone entitled, to the exclusion of representatives of deceased children. [*Wiggins v. Wiggins*] . . . 226

SPECIFIC PERFORMANCE.

A purchase was to be completed on the 25th of October. Before that day arrived, the purchaser, at the vendor's request, extended the time to the 5th of November. The title, however, was not completed on that day. Held, that the purchaser was at liberty to abandon the contract. [*Parkin v. Thoroold*] 1

THELLUSSON ACT.

A testator gave his residuary personal estate to A. and B. in trust to accumulate the income during the life of his niece; and on her death to transfer the capital and accumulations to her children in equal shares, the shares to be vested in her sons at twenty-one, and in her daughters at that age or marriage. The niece lived more than twenty-one years after the testator's death. Held, that the direction to accumulate was not a provision for raising portions within the meaning of the second section of the Thellusson Act; and that therefore it became void under the first section at the expiration of twenty-one years from the testator's death; and that his next of kin were thenceforth entitled to the income of the capital and accumulations. [*Bourne v. Buckton, Ex parte J. C. Haig and Maria his wife*] 91

TITLE.

1. The Defendants, the owners of a cotton mill on the banks of a canal belonging to the Plaintiffs, were authorized by the Act of Parliament under which the canal was made, and the Plaintiffs incorporated, to draw water from the canal for condensing steam, but not for any other purpose, nevertheless they used the water for other purposes. In

consequence of which the Plaintiffs brought an action and obtained a verdict against them, *but only for nominal damages*. The Defendants moved to arrest the judgment in the action, but without success; and afterwards the judgment was affirmed on a writ of error in the Exchequer Chamber. The Defendants, however, continued to use the water as before. Whereupon the bill was filed for an information to restrain them from so doing. The answer stated a case of acquiescence on the part of the Plaintiffs. Held, that the Plaintiffs had sufficiently established their title at law; and that but for their acquiescence they would have been entitled to the injunction, notwithstanding they had recovered only nominal damages in the action. [*The Rochdale Canal Company v. King*] 78

TRUST.

1. Testator by his will gave "all my property, of whatever description, whether in possession, reversion, remainder, or expectancy, or which I may be possessed of at the time of my death; and I give and bequeath the same and every part thereof, unto my dear wife Jane, her executors, administrators, and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her that she shall dispose of the same to and for the joint benefit of herself and my children." The Court gave an opinion that there was no trust created for the children; but, declining to make a positive declaration to that effect, held, that it would be right to alter the residuary personal estate to be transferred and paid to the widow, and decreed accordingly. [*Webb v. Woolls*] 267

2. A testatrix gave to A. and B., in trust for the benefit of C., her sister, a sum of 2000*l.* 3*l.* per Cent. Consols. She afterwards expressed to B., whom she also appointed her executrix, an intention that C. should have a further sum of 2000*l.* Consols, but she did not alter her will. A. died in her lifetime; after her death B., the surviving trustee and executrix, sold 2000*l.* Consols, and invested the produce in her name in the 3*l.* per Cent. Reduced, and shortly afterwards she invested a further sum of 2000*l.* 3*l.* per Cent. Reduced in her name; she was proved to have declared frequently her intention of carrying out the testatrix's intention. Held, that the second sum of stock was duly impressed with a trust in favour of C. [*Gray v. Gray*] 273

VENDOR AND PURCHASER.

- A purchase was to be completed on the 25th of October. Before that day arrived, the purchaser, at the vendor's request, extended the time to the 5th of November. The title, however, was not completed on that day. Held, that the purchaser was at liberty to abandon the Contract. [*Parkin v. Thorold*] . . . 1

VESTING.—See WILL, 9.

VOLUNTARY DEED.

- A voluntary assignee of a debt due from a person deceased, cannot maintain a suit for the administration of the deceased's estate. [*Sewell v. Mossy*] . . . 189

WATER RIGHT.

- What conditions are requisite in order to induce a Court of Equity to grant an injunction to restrain the infringement of a right, acquired by long user, to use the water of a stream for certain purposes. [*Wood v. Sutcliffe*] . . . 63

WILL.

1. Testatrix gave legacies to her son *John Bryan*, and to her daughters, *Ann*, the wife of *James Winson*, *Harriet*, the wife of *William Darnborough*, and she gave her stock in the bank to her said daughter, *Mary Dadley* for life, and after her death to be equally divided between the husbands of her said daughters and her son, or such of them as might be living at *Mary Dadley's* decease. All the husbands named in the will survived the testatrix; but *William Darnborough* was the only one of them who survived *Mary Dadley*. *Ann Winson*, however, married a second time; and her second husband was living at *Mary Dadley's* death, and he claimed a share of the stock; but the Court held by the words "the husbands of my said daughters," the testatrix meant their husbands whom she had named, and therefore that *William Darnborough* was exclusively entitled to the stock. [*In the matter of Brgan's Trust, Ex parte W. Darnborough*] . . . 103
2. Testator directed that a sum of stock standing in his name should be divided between and amongst the relations of his late wife in such manner, shares, and proportions as would have been the case in case she had died possessed of it, a spinster and intestate. The wife had sixteen next of kin living at her death. Five of them died before the testator. Held, that the eleven survivors took only a sixteenth each, and that the other five shares lapsed into the residue, and ought to bear the costs of the petitioners and respondents. [*In the matter of Ham's Trust, Ex parte Biles*] . . 106
3. A testator who died in 1833, devised his residuary real and per-

sonal estate to his eldest son, and his heirs, executors, &c., provided and his will was that, in case his said son should die without leaving any lawful issue of his body, such part of his said residuary estate as was freehold, and situate in certain places, should "at his death" be divided into two equal parts, one of which he gave to his second son and his heirs, and the other to his daughter and her heirs. Held, as to such part of the testator's residuary estate as was freehold and situate in the places named, that his eldest son took, not an estate tail in it, but an estate in fee, with an executory devise over, to take effect at his death, in case he should have no issue then living. [*In the matter of the Wilts, Somerset, and Weymouth Railway Company's Act, and of the Lands Clauses Consolidation Act 1845, Ex parte Matthew Davies, the younger*] 114

4. A testatrix, having a general power of appointment over a sum of stock under the will of T. S., appointed the stock to her sons *Joseph* and *John*, and her other children equally, and she left any other sum of money or property to which she then was or might thereafter become entitled under the will of T. S. to be divided amongst such of her children as might be living at her death, and she constituted *Joseph* her residuary legatee: *John* died before her. Held, that *Joseph* was entitled to the share of the stock intended for *John*. [*In the matter of Spooner's Trust, Ex parte Isabella Mouritz, widow, and others*] . . . 129
5. Testator, tenant for life under a settlement of the B. H. estate and other lands, remainder to his first and other sons in tail male, remainder to A., his brother for life, with re-

mainder to his first and other sons in tail male, remainder to other brothers of the testator in like manner, and, after other intermediate limitations, remainder over to the sisters of the testator, as tenants in common in tail general. The testator, by his will, gave certain specific things to be enjoyed by the person or persons who for the time being should be entitled to the freehold or inheritance of the family estate at Stapleton, as in the nature of heir-looms. He gave his furniture, plate, &c., to his brother A. He directed a sum of 1000*l.*, secured to him on the B. H. estate, and other estates, to sink into the freehold *and* inheritance of the said estates, that the same might merge therein, and the rents and arrears of rent, with timber felled, and other *annual profits* due to him at the time of his decease from the B. H. estate, unto the person or persons who should be entitled to the freehold *and* inheritance of the same estate in possession on his decease. He gave his residue to his two brothers, B. and C., and he appointed his brother A. sole executor. B. died in the testator's lifetime. Held, first, that in the gift of the rents, &c., the word *and* must be read *or*, and that they passed to A., although he was entitled only to the freehold; secondly, that certain prepared brick earth, dug out of the estate by the tenant for life, and lying upon it at his death, and certain tiles so made and remaining on the estate, were comprised in and passed by the words "other annual profits;" thirdly, that certain apportionable parts of the rents, which under the Apportionment Act went to the testator's executor, as part of his assets passed under the words "due to him at the time of

his decease." [*Stapleton v. Stapleton*] 212

6. A testator gave various specific portions of personal estate to his wife *for and during her natural life, if she should so long continue his widow*; but at her death, or in case she should marry again, then he gave all the things before given, adding the words "and effects, and also all my household furniture, which I hereby give to her for her sole use and benefit for and during the term of her natural life, if she shall so long continue my widow," to be equally divided among the children that he then had or might thereafter have by his said wife; but in case his wife should not marry again after his decease, he gave her "all and every his personal estate and effects whatsoever" for her life, and the same to be equally divided to and amongst *such of his children as should be living at her decease*, share and share alike. The testator died within three weeks after making his will. Held, first, that the first gift was not merely specific, but passed the whole of his personal estate; secondly, that the two clauses were not repugnant, but the first was intended to apply to the case of the widow marrying again; and the second, to the case of her not marrying again; and the latter event being that which happened, the children living at the death of the widow were alone entitled, to the exclusion of representatives of deceased children. [*Wiggins v. Wiggins*] 226

7. A testator, by his will, directed that his residuary personal and real estate should be sold, and the proceeds vested in some government annuity for the benefit of his wife, L. Lloyd, and of A., for their joint

lives, and at the death of either of them her share to go to the survivor; "and in case either L. Lloyd or A. should marry or to live in a state of adultery, then her share shall pass to the other, the same as if death had taken place; and should L. Lloyd and A. both marry, then their shares and interest shall pass to my nephew H. in case L. Lloyd and A. fails in fulfilling the conditions of this my will." And he directed L. Lloyd and A., out of the annuities they received, to keep in good and sound repair a certain tomb and vault belonging to him, and to paint it, "and in default of failure, they shall lose and forfeit their claims to the annuities, and any person hereafter that shall receive the annuities shall be bound to perform the same conditions." Held, that, as between L. Lloyd, the widow, and A., the gift over to A. upon L. Lloyd marrying, was good; but the condition against A. marrying was void; that the gift over in the case of both marrying, was void; and that the condition annexed to the gift of the annuities to L. Lloyd and A. to keep his tomb in repair was good. By a codicil, the testator gave the rent of a copyhold house for the benefit of his wife and A., to be applied as in his will set forth, subject to all the conditions contained in his will, share and share alike; and after the death of his wife and A., or in default of their, L. Lloyd and A., not fulfilling the conditions contained in his will, he gave the said house upon trust for the minister and churchwardens of St. Mary's, Chatham, to apply the rents as follows: to take 5*l.* per annum for themselves out of the rents, to keep the tomb in repair; and the

residue and remainder of the rent to be applied for the benefit of his nephew, and, after the death of his nephew, the remainder of the rent to be applied for the benefit of the Church Missionary Society. At the original hearing, the devise to the ministers and churchwardens was declared void, and they were dismissed. Held, that this decree was conclusive against the whole of the gift to the churchwardens, and that all the trusts failed; that the widow and A. took the legal estate in the rents during their joint lives, and the life of the survivor; with remainder to the customary heir of the testator. [*Lloyd v. Lloyd*] 255

8. Testator by his will gave "all my property of whatever description, whether in possession, reversion, remainder, or expectancy, or which I may be possessed of at the time of my death, and I give and bequeath the same and every part thereof unto my dear wife *Jane*, her executors, administrators, and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her that she shall dispose of the same to and for the joint benefit of herself and my children." The Court gave an opinion that there was no trust created for the children; but, declining to make a positive declaration to that effect, held, that it would be right to order the residuary personal estate to be transferred and paid to the widow, and decreed accordingly. [*Webb v. Woods*] 267

9. A testator, who had two sons and one daughter, gave the interest, dividends, and annual proceeds of 3000*l.* stock, standing in his name,

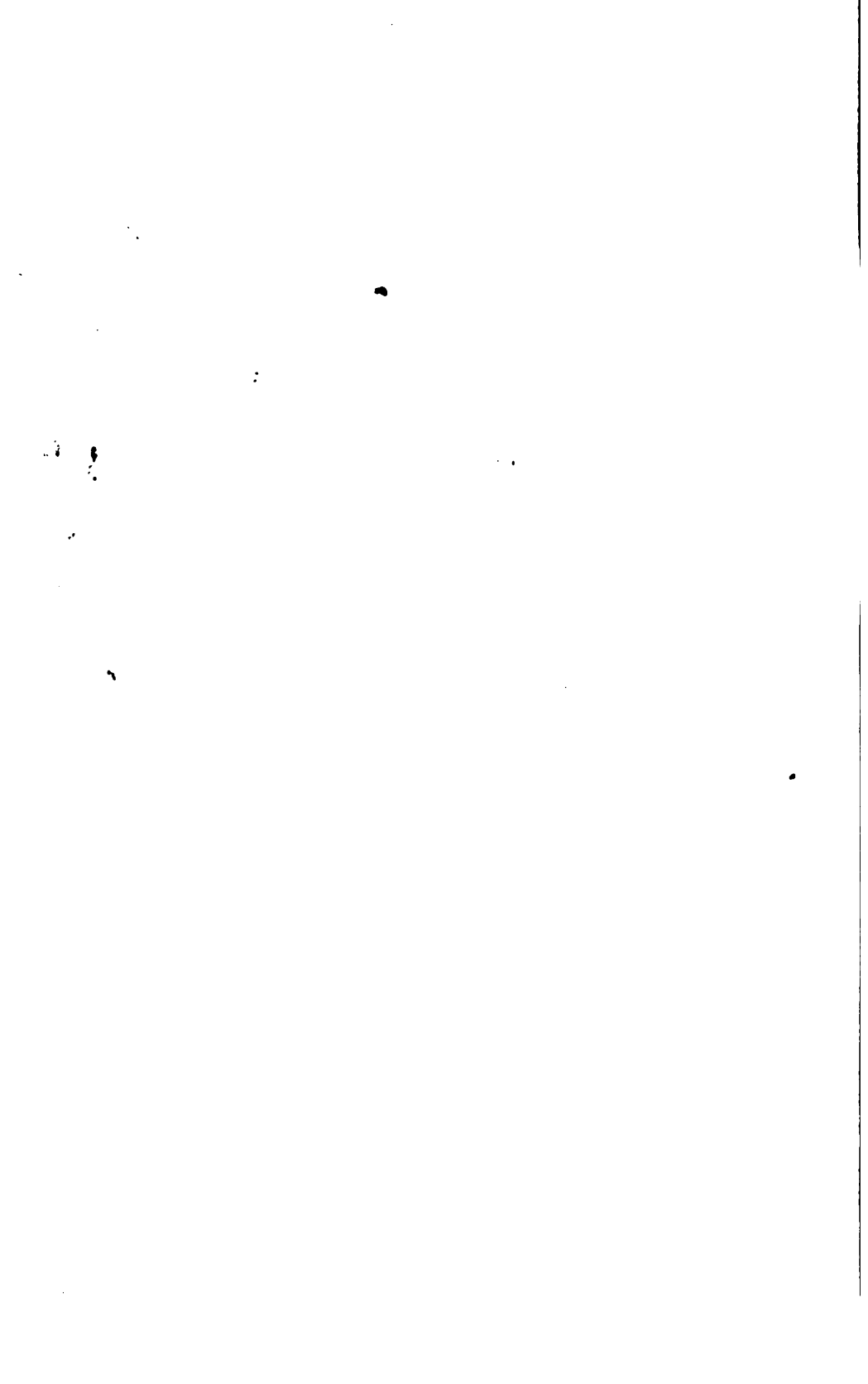
- to W., one of his children, for life, and after his decease, he gave the said principal stock or sum of 3000*l.* unto all and every the child and children of W. to be equally divided between and amongst them, if more than one, share and share alike; and if but one, the whole to such one, to be paid or transferred to him, her, or them, on his, her, or their attaining twenty-one, and the interest to be in the mean time applied for maintenance and education; he gave similar legacies to each of his other two children and their children; *and upon the death of either of my said sons or daughter without issue, then I direct that the interest, dividends, and produce so as aforesaid given and bequeathed to him, her, or them so dying, shall be paid and payable to the survivors or survivor of them my said sons and daughter in equal shares and proportions.* The testator's son W. survived him, and had one child, who predeceased him. Held, that the limitation over referred to the death of either of the testator's children without leaving issue living at his death; that the child of W. took a vested interest at his birth, but liable to be divested by the death of W., without leaving issue living at his death, and that the gift over therefore took effect [*Westwood v. Southey*] 193
10. In April 1811, A. conveyed an estate (which stood limited to him and his trustee, *to the usual uses to bar dower*, to a mortgagee in fee, subject to a proviso for the reconveyance thereof to him,

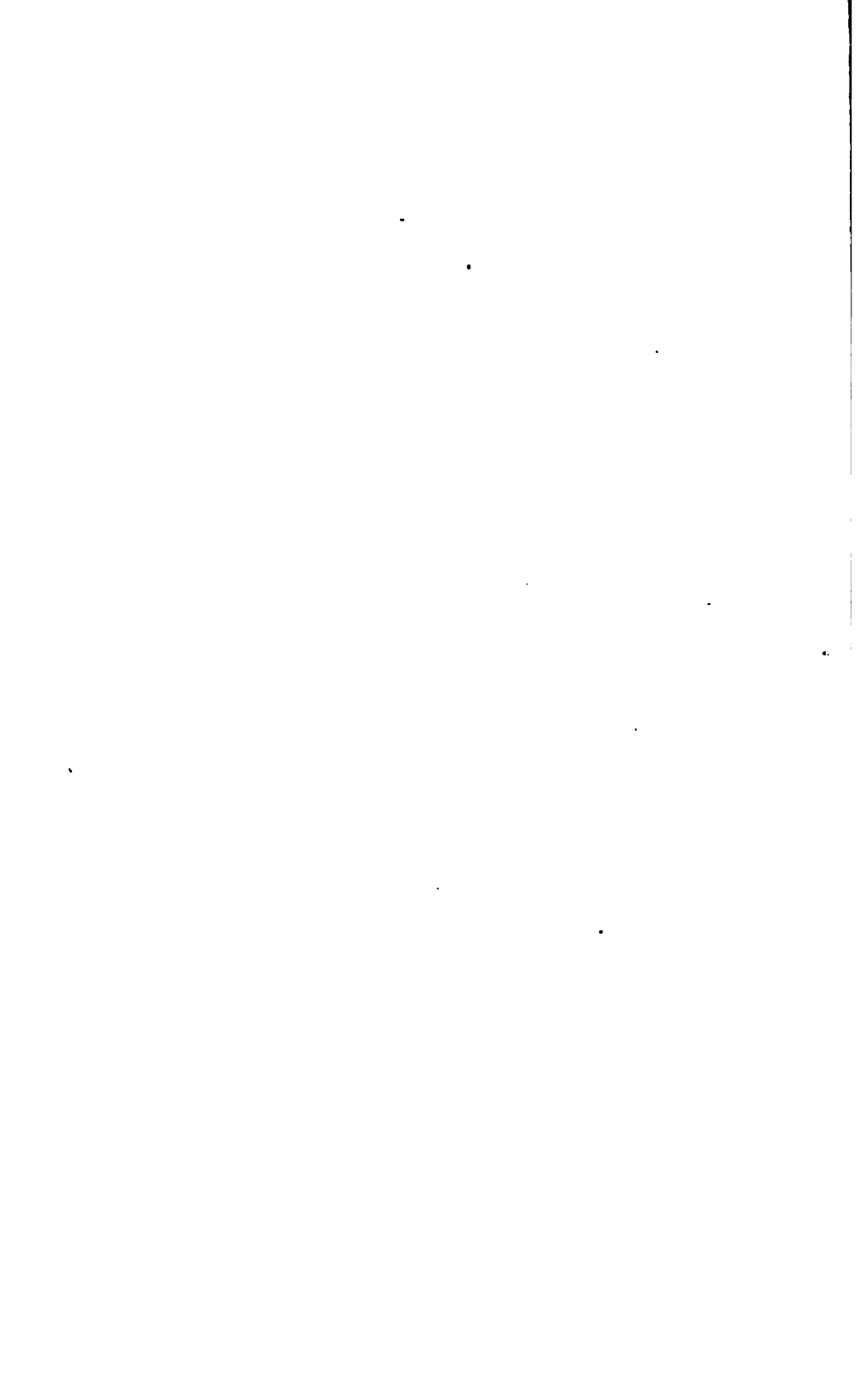
his heirs, appointees, or assigns, or to such other person or persons, to such uses and in such manner as he or they should direct. In May following, he devised all his messuages, lands, &c. and all other his real estate, or which he had contracted to purchase, situate in or near the parishes of B. or S., or elsewhere in England, of or to which he or any person or persons in trust for him, was or were seised or entitled for any estate of freehold and inheritance, or of freehold only, in possession, reversion, remainder, or expectancy, or which he had power to dispose of or appoint by his will, to J. D., a stranger to him in blood, and his heirs, to certain uses and upon certain trusts. In 1813, he paid off the mortgage, and took a reconveyance, by which, after reciting the mortgage, the premises were limited to him and his trustee, *to the usual uses to bar dower.* In 1809, he purchased an estate in one of the parishes mentioned in his will, at an auction, and, in Nov. 1811, that estate was conveyed to him and his trustee, *to the usual uses to bar dower.* Held, that the reconveyance of 1813, and the conveyance of 1811, revoked the will as to the mortgaged premises and purchased estate respectively, and that the testator's heir, (who was entitled to benefits under the will,) was not bound to elect. [*Plowden v. Hyde*] . 171

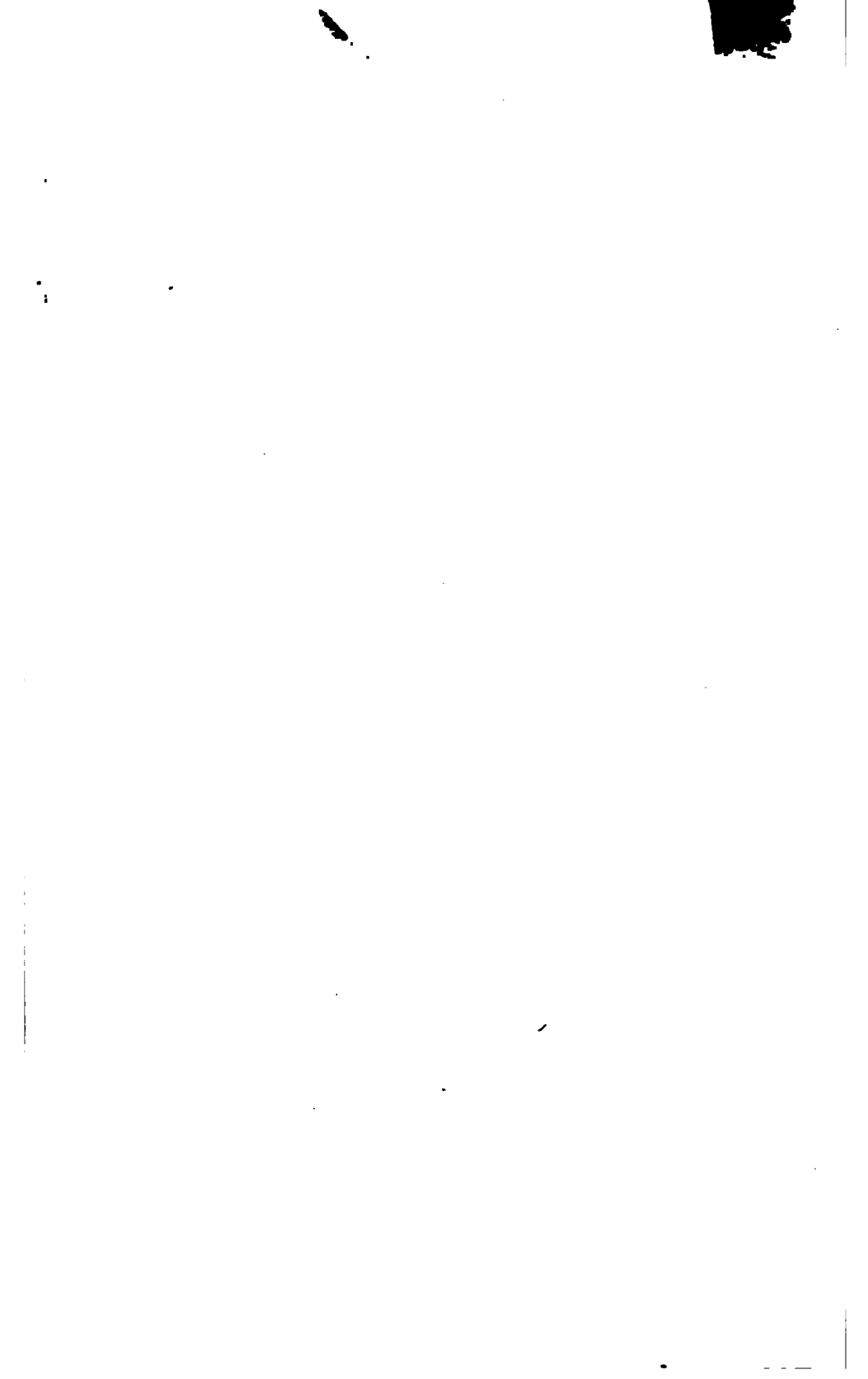
See EXECUTORY DEVISE.

WORDS.

See WILL, 5.







Standard Law Library



3 6105 062 833 897



